Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

MICHIGAN MUTUAL INSURANCE COMPANY,
a Michigan corporation, as subrogee of
Center Manufacturing, Inc.,

Petitioner,

v.

OSRAM SYLVANIA, INC., a New York corporation,
formally known as GTE PRODUCTS CORPORATION,
a New York Corporation,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit**

PETITION FOR WRIT OF CERTIORARI

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81 pp

QUESTION PRESENTED FOR REVIEW

Whether the District Court erred in granting, and the Court of Appeals erred in affirming, summary judgment to Respondent, where, contrary to this Court's well-established precedent, the District Court and Court of Appeals reached their decisions by drawing inferences from the facts in favor of Respondent, **the moving party**?

LIST OF ALL PARTIES TO THIS PROCEEDING

The Plaintiff-Petitioner is MICHIGAN MUTUAL INSURANCE COMPANY. Petitioner is a member of the AMERISURE COMPANIES group, which also includes the following insurance companies (which are neither parents nor subsidiaries of Petitioner):

AMERISURE INSURANCE COMPANY
AMERISURE RE (BERMUDA) INC.
CAROLINA AMERICAN INSURANCE COMPANY
UNISUN INSURANCE COMPANY

In addition, Petitioner did share the risk regarding Center Manufacturing, Inc. with several insurance companies as part of an unincorporated association of property insurers. Therefore, these insurers have a financial interest in the outcome of this litigation. However, because none of these other insurers are parents or subsidiaries of Petitioner, Rules 14(b) and 29.6 of the Rules of the Supreme Court of the United States do not require that their names be disclosed. Of course, if this Court would like the names of these other insurers, Petitioner will provide that information.

With respect to other parties, there were originally two Defendants in this case. First, there was Defendant-Respondent OSRAM SYLVANIA, INC. (it is still a Defendant). Second, there was LITHONIA LIGHTING PRODUCTS. However, Lithonia is no longer a party to this case, Petitioner having settled with it prior to this appeal being commenced

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OPINIONS AND ORDERS BELOW

The District Court's April 4, 1995 Opinion and Order granting Respondent's Motion for Summary Judgment, set forth in the attached Appendix starting at page App. 40, is reported in the Federal Supplement. *Michigan Mutual Ins. Co. v Osram Sylvania, Inc.*, 897 F. Supp. 992 (W.D. Mich. 1995). The United States Court of Appeals for the Sixth Circuit's April 17, 1997 Opinion affirming the District Court (with one judge dissenting) is unpublished. It can be found in the attached Appendix beginning at page App. 1. The Court of Appeals' May 27, 1997 Order denying Petitioner's Motion for Rehearing En Banc, also unpublished, can be found in the attached Appendix beginning at page App. 11.

STATEMENT OF THE BASIS FOR JURISDICTION

Petitioner seeks review of the April 17, 1997 Opinion of the United States Court of Appeals for the Sixth Circuit (*see* App. 1). Petitioner timely filed a Petition for Rehearing En Banc, which the Court of Appeals denied on May 27, 1997 (*see* App. 11). Pursuant to Sixth Circuit Rule 14(a), this Petition is also treated as a Petition for Rehearing (and the original Court of Appeals panel treated it as such – *see* App. 11).

Petitioner has filed the instant Petition within 90 days of the May 27, 1997 Court of Appeals Order denying its Petition for Rehearing En Banc. Accordingly, this Court has jurisdiction to review the Court of Appeals' Opinion pursuant to 28 U.S.C. §1254(1), 28 U.S.C.

§2101(c), and Rules 13.1 and 13.3 of the Rules of the Supreme Court of the United States.

STATUTES/COURT RULES INVOLVED

The Court Rule involved in this matter is Federal Rule of Civil Procedure 56. Relevant portions of Fed. R. Civ. P. 56 are set forth in the attached Appendix at page App. 48.

STATEMENT OF THE CASE

A. Nature Of This Case

This case arises out of a catastrophic July 9, 1991 fire that severely damaged a manufacturing plant owned by Center Manufacturing, Inc. ("Center"). The fire was caused by a defective metal halide lamp manufactured by Defendant-Respondent, Osram Sylvania, Inc. ("Respondent"). Plaintiff-Petitioner, Michigan Mutual Insurance Company ("Petitioner"), Center's property insurer, paid Center over $2,400,000 as a result of the fire, and became subrogated to Center's claims against Respondent for this amount. Petitioner subsequently filed a products liability action against Respondent, asserting Uniform Commercial Code ("UCC") and tort claims.

Respondent filed a Motion for Summary Judgment as to Petitioner's claims. In an April 4, 1995 Opinion and Order (App. 40), the District Court granted the Motion, dismissing Petitioner's claims against Respondent. The District Court concluded Petitioner's UCC claims were

time-barred, and its tort claims were barred by Michigan's economic loss doctrine.

Petitioner appealed the dismissal of its tort claims to the United States Court of Appeals for the Sixth Circuit (it did not challenge the District Court's finding that its UCC claims were time-barred). In an unpublished April 17, 1997 Opinion (one judge dissenting), the Court of Appeals affirmed the District Court's decision (*see* App. 1). Petitioner timely filed a Petition for Rehearing En Banc, but the Court of Appeals denied that in a May 27, 1997 Order (*see* App. 11).

B. The Relevant Facts

On July 9, 1991, a 400 watt metal halide lamp manufactured by Respondent exploded, causing a catastrophic fire at Center's Michigan manufacturing facility (Center manufactures non-electronic automobile components). (App. 16 – Complaint, ¶9; App. 41 – District Court Opinion and Order). The lamp's explosion caused white hot quartz particles to fall on a stack of cardboard cartons, setting them on fire. (App. 41 – District Court Opinion and Order). At the time of the fire Respondent's lamp was installed in an uncovered metal halide fixture, and it and the lamp operated in a vertical position. Had the fixture been a closed one (containing a cover over the lamp), the cover might have contained the hot quartz particles within the fixture when the lamp exploded.

The specific metal halide lamp that caused the fire was manufactured by Respondent in January of 1984, and was likely installed at the Center facility between

mid-1984 and early 1985. (App. 41 – District Court Opinion and Order). Center did not purchase the lamp directly from Respondent, nor did it enter into any type of contract with Respondent. Rather, it purchased the lamp from a third-party supplier whose identity is in dispute. (App. 42 – District Court Opinion and Order). Indeed, it is undisputed that **Center had absolutely no contact with Respondent when it purchased the lamp**. (*See* App. 29 – ¶6 of Declaration of Paul Robinson, originally Ex. 4 to Respondent's Motion for Summary Judgment).

Prior to late 1985, Respondent provided the following warning regarding its metal halide lamps:

> Lamp arc tube operates under pressure and at high temperatures and may shatter during operations. For continuous duty application it is recommended that all metalarc lamps be group relamped on or about rated life and be cycled (turned off) at least once per week to reduce the risk of non-passive failure.

(App. 39 – Metalarc Lamp warning, originally Ex. 8B to Petitioner's Response to Respondent's Motion for Summary Judgment). **However, in a "Burning Positions" diagram provided along with this warning, Respondent indicated its lamp could be safely operated in a vertical position in an uncovered fixture!** (*See* App. 39).

The warning was grossly inadequate. Dr. Burton Z. Davidson, Distinguished Professor of Chemical and Biochemical Engineering at Rutgers University, evaluated the warning in an Affidavit provided by Petitioner. (*See* App. 35, originally Ex. 8 to Petitioner's Response to Respondent's Motion for Summary Judgment). According to Dr. Davidson, the warning was deficient in several

respects, including a) failing to warn about the consequences of a metal halide lamp shattering during operation, b) failing to provide users of the lamp with a definition of a "non-passive failure," and c) informing users of the lamp (via the "Burning Positions" diagram) that **the lamp could be safely operated in a vertical position in an uncovered fixture**. (App. 36 and 37 – Davidson Affidavit ¶5].[1]

C. Proceedings Below/Basis For Federal Jurisdiction

In July of 1993 Plaintiff commenced this action against Respondent in the U.S. District Court for the Western District of Michigan, which had jurisdiction over this matter by virtue of diversity of citizenship. 28 U.S.C. §1332. Petitioner asserted both UCC and products liability tort claims against Respondent. (*See* App. 13 – Complaint).

Respondent subsequently filed a Fed. R. Civ. P. 56 Motion for Summary Judgment. Respondent argued Petitioner's UCC claims were barred by the applicable statute of limitations, and its tort claims, while not time-barred, were precluded by operation of Michigan's economic loss

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[1] In late 1985, **after** the lamp in question was purchased and installed in Center's facility, Respondent **for the first time** informed users not to operate the lamp in uncovered fixtures. (*See* App. 29 through App. 32 – Robinson Declaration, ¶¶6 and 7). Center acted immediately in response. It stopped purchasing Respondent's lamps, and it embarked on a program of removing all of Respondent's lamps from its facility (the facility contained over 100 metal halide fixtures). Unfortunately, while Center did its best, it missed at least one lamp which caused the fire.

doctrine. Petitioner timely responded, acknowledging that its UCC claims were apparently time-barred. However, as to its tort claims, Petitioner argued that based on the nature of the relationship (or lack thereof) between Center and Respondent, genuine issues of material fact remained as to whether the two-step test for applying the economic loss doctrine was satisfied.[2] The presence of these genuine issues should preclude the grant of summary judgment.

Without hearing argument, on April 4, 1995 the District Court issued its Opinion and Order granting Respondent's Motion (*see* App. 40). The District Court began by dismissing Petitioner's UCC claims based on Petitioner's admission that these claims were no longer viable and/or time-barred (App. 42). The District Court then turned to Petitioner's tort claims, analyzing them in light of the economic loss doctrine. The District Court held the economic loss doctrine applied in this case, and it operated to bar Petitioner's tort claims. Coupled with the fact that Petitioner had no viable UCC claims, the District Court concluded this case should be dismissed. (App. 46).

In so holding, the District Court found that both parts of the two-step test for applying the economic loss

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[2] As will be discussed in greater detail below, in order for the economic loss doctrine to bar Petitioner's tort claims (for damage to property other than the defective lamp), Respondent had to establish 1) a fire causing extensive damage was within the contemplation of Center when the lamp in question was purchased, **and** 2) when the lamp was purchased Center had an opportunity to negotiate with Respondent, allocating the risk of such a fire.

doctrine were satisfied. As to the first (was a fire within the contemplation of both Center and Respondent), the District Court found it was foreseeable to Center that the lamp could explode and cause a fire as "[f]ires caused by electrical products are simply not beyond the contemplation of commercial entities." (App. 45). With regard to the second element (opportunity to negotiate), the District Court concluded that even though Center never dealt directly with Respondent, an electrical product **manufacturer**, the fact Center dealt with numerous third-party **suppliers** of electrical products indicated that Center could have "shopped around and negotiated the terms of purchase for the product." (App. 44).

Petitioner appealed the District Court's decision to the United States Court of Appeals for the Sixth Circuit. Petitioner pointed out that in reaching its decision, the District Court improperly drew inferences from the undisputed facts in favor of the Respondent – **the moving party**. Unfortunately, as discussed in greater detail below, two of the three Sixth Circuit Judges hearing this appeal committed the same fundamental error. As a result, in an April 17, 1997 unpublished Opinion, the Court of Appeals affirmed the dismissal of this case (*see* App. 1 – Court of Appeals Opinion). Petitioner timely filed a Petition for Rehearing En Banc, but that was denied in a May 27, 1997 Order (although the judge dissenting from the original decision stated she would have granted rehearing) (*see* App. 11).

ARGUMENT

THE PETITION SHOULD BE GRANTED, AS THE DISTRICT COURT AND COURT OF APPEALS BLATANTLY VIOLATED THIS COURT'S WELL-ESTABLISHED RULES GOVERNING THE RESOLUTION OF SUMMARY JUDGMENT MOTIONS

A. Summary Of Argument

Respondent's Motion for Summary Judgment centered on Michigan's economic loss doctrine. The doctrine is premised on the assumption that commercial purchasers of a product can foresee hazards associated with the use of the product, and are in a position to negotiate with the product manufacturer regarding the allocation of such risks. If the product turns out to be defective, and causes a loss, the commercial purchaser is limited to its bargained-for remedies under the UCC.

Accordingly, as explained in *Detroit Edison Company v NABCO, Inc.*, 35 F.3d 236 (6th Cir. 1994), the economic loss doctrine bars Petitioner's tort claims **only if** two things are established: 1) a fire causing extensive damage was within the contemplation of Center when the lamp in question was purchased, **and** 2) when the lamp was purchased Center had an opportunity to negotiate with Respondent, allocating the risk of such a fire. If **either** of these elements are missing, the conditions upon which the economic loss doctrine is based do not exist, and the doctrine does not bar Petitioner's timely-filed tort claims against Respondent.

As will be established below, genuine issues of material fact remain as to the existence of either of the two critical *Detroit Edison* elements. As a result, Respondent's

Motion for Summary Judgment should not have been granted. In its April 1997 Opinion, the Court of Appeals panel (the majority, not the dissent) took the same approach as the District Court. It circumvented these genuine issues of fact by drawing inferences from the evidence in favor of Respondent, **the moving party**, concluding both *Detroit Edison* elements had been established. This is in direct conflict with *U.S. v Diebold, Inc.*, 369 U.S. 654, 82 S. Ct. 993, 8 L.Ed.2d 176 (1962), *Anderson v Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L.Ed.2d (1986), and a number of other decisions by this Court. In these cases, this Court unequivocally held that in ruling on a Fed. R. Civ. P. 56 motion for summary judgment, inferences from the facts should be construed in favor of the **nonmoving party** (here Petitioner).

Petitioner is frankly at a loss as to why the District Court and the Court of Appeals decided to so blatantly ignore this Court's established precedent, and dismiss Petitioner's case against Respondent. Petitioner, like any other plaintiff, is entitled to have the law applied to its claims, and where justified, have the merits of its case resolved by the trier of fact. In any event, if this Court's rules for the resolution of summary judgment motions are to have any meaning, and if parties are to be protected from District Courts rushing to judgment by granting summary judgment where genuine issues of material fact remain, the Court of Appeals' April 1997 Opinion cannot stand. Consequently, this Court should grant this Petition, and after further briefing and oral argument, this Court should reverse the Court of Appeals Opinion and reinstate this case.

B. Controlling Law

As this Court observed in *Anderson*, the resolution of a summary judgment motion involves procedural and substantive concerns. 477 U.S. at 248. Procedurally, Fed. R. Civ. P. 56, and decisions by this Court, provide the framework for ruling on a motion alleging there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. At the same time, the substantive law governing the claims or defenses in question establishes which facts are material, and which are not. *Anderson, supra.*

Petitioner believes, and the record establishes, that the Court of Appeals (and the District Court) committed serious error regarding the procedural aspect of a Fed. R. Civ. P. 56 summary judgment determination. However, to understand this error it is important to be familiar with the substantive law under which the District Court and Court of Appeals dismissed this action. Accordingly, Petitioner will discuss both the procedural rules governing summary judgment determinations and Michigan's economic loss doctrine.[3]

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[3] So that there is no misunderstanding, Petitioner is not alleging that the Court of Appeals misapplied or misinterpreted the economic loss doctrine. (Petitioner could not make such an argument to this Court, as that is purely a question of state law). Rather, Petitioner is arguing that the District Court and Court of Appeals violated this Court's procedural rules regarding summary judgment determinations in applying the economic loss doctrine in this case.

1. This Court's rules governing the resolution of summary judgment motions

Fed. R. Civ. P. 56(b) permits defendants in civil actions to move for summary judgment, just as Respondent did in the instant case (*see* App. 48). If "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law," then the defendant is entitled to summary judgment. Fed. R. Civ. P. 56(c) (*see* App. 48).

Summary judgment should not be a substitute for a trial, and courts should be cautious in granting such relief:

> Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. . . . Neither do we suggest that the trial courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial.

Anderson, 477 U.S. at 255. This justifiably cautious approach has led this Court to articulate a fundamental rule for the resolution of summary judgment motions – **all inferences from the underlying facts must be drawn in favor of the non-moving party**. *Eastman Kodak Co. v Image Technical Services, Inc.*, 504 U.S. 451, 456, 112 S. Ct. 2072, 119 L.Ed.2d 265 (1992); *Anderson*, 477 U.S. at 255; *Matsushita Electric Industrial Co., Ltd. v Zenith Radio Corp.*,

475 U.S. 574, 587-588, 106 S. Ct. 1348, 89 L.Ed.2d 538 (1986); *Adickes v S.H. Kress & Co.*, 398 U.S. 144, 158-159, 90 S. Ct. 1598, 26 L.Ed.2d 142 (1970); *U.S. v Diebold, Inc.*, 369 U.S. at 655.

Consequently, in *U.S. v Diebold, Inc.*, the District Court granted summary judgment for the defendant in a civil antitrust suit filed by the United States. It did so by drawing inferences in favor of the defendant, the moving party. Based on the above-mentioned rule, this Court reversed that decision:

> . . . [The District Court's] findings represent a choice of inferences to be drawn from the subsidiary facts . . . **On summary judgment the inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion.** A study of the record in this light leads us to believe that inferences contrary to those drawn by the trial court might be permissible. The materials before the District Court having thus raised a genuine issue as to ultimate facts material . . . it was improper for the District Court to decide the applicability of the rule on a motion for summary judgment.

369 U.S. at 655 (emphasis added).

2. Michigan's economic loss doctrine

Many states have some version of the economic loss doctrine applying to products liability claims. Michigan's is based on the Michigan Supreme Court's decision in *Neibarger v Universal Cooperatives, Inc.*, 439 Mich. 512, 486 N.W.2d 612 (1992), and subsequent cases, foremost

among them *Detroit Edison, supra.*[4] If the doctrine applies, a plaintiff is precluded from seeking to recover, in tort, damages to the defective product itself. Rather, the plaintiff is limited to its UCC remedies.[5] This doctrine does not bar tort claims for personal injuries caused by a defective product, nor does it bar, in certain circumstances, tort claims for damage to property other than the defective product itself.

In the instant case, Petitioner's tort claims are almost entirely for fire damage to "other property" caused by Respondent's defective metal halide lamp (*e.g.*, property other than the lamp itself). Prior to *Neibarger*, in Michigan

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[4] The economic loss doctrine is succinctly and accurately explained in Judge Daughtrey's dissent from the Court of Appeals' Opinion (*see* App. 6 through App. 10).

[5] In Michigan, as in most states, the UCC's four-year statute of limitations begins to run from the date the defective product in question is delivered. M.C.L.A. §440.2725, M.S.A. §19.2725. Conversely, the three-year statute of limitations for a products liability tort claim, M.C.L.A. §600.5805(9), M.S.A. §27A.5805(9), runs from the date of the accident caused by the defective product (as until that point the plaintiff has not, nor could it have, discovered that it has a possible cause of action). *Warren Consolidated Schools v W.R. Grace & Company*, 205 Mich. App. 580, 518 N.W.2d 508, 510 (1994), *lv. den.*, 530 N.W.2d 750 (Mich. 1995).

Accordingly, unless a product malfunctions and causes a loss within four years of its delivery, the plaintiff will not be able to assert any UCC claims. This leaves only products liability tort claims. If the economic loss doctrine applies, precluding these claims as well, the plaintiff has no available remedies. This is why, in most cases, the application of the economic loss doctrine as a practical matter means the product manufacturer is shielded from any and all liability for its defective product.

the economic loss doctrine only barred tort claims for damage to the defective product itself. Tort claims seeking to recover damage caused to other property were not excluded. In *Neibarger*, this other property damage exception was narrowed, but not eliminated:

> The rule that emerges from *Neibarger* significantly narrows the "other property" exception while expanding the definition of economic loss. Under *Neibarger*, tort claims for damage to other property are barred by the economic loss doctrine **if those losses are direct and consequential losses that were within the contemplation of the parties and that, therefore, could have been the subject of negotiations between the parties.**

Detroit Edison, 35 F.3d at 241 (emphasis added).

Consequently, pursuant to the economic loss doctrine, Petitioner's tort claims for damage to Center's other property are barred **only if** two things are established. First, a fire causing extensive damage was within the contemplation of Center when the lamp in question was purchased. Second, when the lamp was purchased Center had an opportunity to negotiate with Respondent, allocating the risk of such a fire.[6] If genuine issues of fact

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[6] The second element – an opportunity to negotiate – is perhaps the most important, as the economic loss doctrine is premised on the assumption that the parties could have allocated the risk of a defective product via negotiated warranties, disclaimers, insurance requirements, etc. This was recognized by the Michigan Court of Appeals in *Huron Tool and*

remain regarding **either** of these two requirements, then it cannot be concluded that **as a matter of law** Petitioner's tort claims are barred.

C. Genuine Issues Of Fact Remain Whether Respondent Satisfied Both Elements Of The Economic Loss Doctrine

Analyzing the facts discussed above, it is clear that genuine issues of material fact remain as to whether either element of the economic loss doctrine has been established. As to the first element (contemplation of the parties), there is no evidence that when Respondent's lamp was purchased and installed between mid-1984 and early 1985 (App. 41 and 42 – District Court Opinion and Order) it was reasonably within Center's contemplation that the lamp could cause a major fire. Center was no expert on metal halide lamps, and in a generic sense a metal halide lamp cannot be considered a likely source of a catastrophic fire.

Indeed, the only evidence introduced on this issue established that when Center purchased Respondent's metal halide lamp, it had no reason to contemplate the lamp would be dangerous (let alone be a potential cause

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Engineering Co. v Precision Consulting Services, Inc., 209 Mich. App. 365, 532 N.W.2d 541 (1995):

> . . . [This Court has held] that **the economic loss doctrine does not apply where there is no contractual relationship between the parties – that is, where the parties have never been in a position to negotiate** the economic risks themselves.

532 N.W.2d at 545 (emphasis added).

of a catastrophic fire) when operated in a vertical position in an uncovered fixture. Remember, **in a "Burning Positions" diagram provided along with the lamp** (*see* App. 39), Respondent assured purchasers that its lamp could be safely operated in a vertical position in an uncovered fixture. Respondent's lamp that caused the July 9, 1991 fire was operating in a vertical position in an uncovered fixture!

Consequently, with regard to the first element, **at the very least** a genuine issue of fact remained as to whether it was satisfied. This was correctly recognized by Judge Daughtrey in her dissenting opinion from the Court of Appeals' decision:

> In this case, we have a consumer purchasing a lamp from a third party without the benefit of negotiations or the expertise that contract law expects. The risk associated with this malfunctioning product appropriately rests with the manufacturer, **for there is no reasonable expectation that a distant purchaser will seek a separate warranty for a sudden light bulb explosion**.

(App. 10 – Dissent from Court of Appeals Opinion) (emphasis added).

Issues of fact also remain regarding the second element of the economic loss doctrine (an opportunity to negotiate the allocation of risk of other property damage). As previously discussed, Center had **no** opportunity to negotiate with Respondent regarding the purchase of the lamp in question. Indeed, Center had **no** contact with Respondent at all (contractual or otherwise). Rather, Center purchased the lamp from a third party (a supplier).

(App. 29 – Robinson Declaration ¶6; App. 42 – District Court Opinion and Order).

Consequently, even if a risk of a catastrophic fire was foreseeable at the time Center purchased Respondent's lamp, **the only evidence ever presented by either party establishes there was no opportunity for Center to negotiate with Respondent** regarding such a possibility. Absent an opportunity to negotiate, there is simply no reason to apply the economic loss doctrine. Once again, this was not lost on Judge Daughtrey in her well-reasoned dissenting opinion:

> Here, we have a business acting as a consumer, purchasing a lamp from a third party, not the manufacturer. From the plaintiff's description of the facts, **this third-party sale did not involve any negotiations, nor did it include discussions of warranties, disclaimers, or risks of sudden explosions and fires**. Center Manufacturing purchased this lamp the same way any individual consumer would buy a light bulb off a store shelf. The lamp was not part of its manufacturing process, nor was it a product that fell within the business expertise of Center Manufacturing. **The potential negotiations that the economic loss doctrine requires as its premise simply did not and could not exist.**

(App. 9 – Dissent from Court of Appeals Opinion) (emphasis added).

There is a total absence of evidence supporting the conclusion that Center had an opportunity to negotiate with Respondent prior to its purchase of Respondent's lamp. Coupled with evidence establishing there was no such opportunity, if any party was entitled to summary

judgment regarding the second element of the economic loss doctrine it was Petitioner. In any event, at the very least a genuine issue of material fact remains regarding the second element, which should have precluded summary judgment for Respondent.

D. The District Court And Court Of Appeals Reached A Contrary Conclusion By Improperly Viewing Inferences From The Facts In Favor Of Respondent, The Moving Party

In the instant case the Court of Appeals (and the District Court as well) was confronted with genuine issues of material fact concerning both elements of the economic loss doctrine. The majority in the Court of Appeals' April 17, 1997 Opinion took the same approach as the District Court – it circumvented these issues of fact by viewing inferences from the facts in favor of Respondent, the moving party. Even if these inferences were plausible, there were equally plausible conflicting inferences in Petitioner's (the non-movant's) favor. The Court of Appeals was **required** to give the benefit of the doubt to Petitioner regarding any conflicting inferences. For some reason it did not do so. Regardless of the majority's motivation, its decision is directly at odds with the rule from *United States v Diebold, Inc.*, *Anderson* and this Court's other decisions discussed above. Therefore, this Court should grant this Petition, and after further briefing and argument, reverse the Court of Appeals' decision and reinstate this case.

As to the first element (contemplation of the parties), the Court of Appeals held:

> . . . [I]t seems to us that the inherent fire hazard associated with a 400-watt halide lamp is no less within the contemplation of the parties than is the inherent danger posed by a section of reheat pipe.

(App. 5 – Court of Appeals Opinion).[7]

Giving the majority opinion's reasoning the greatest benefit of the doubt, there are two conflicting plausible inferences. First, there is the inference implicitly adopted by the majority – as a general rule it is always foreseeable that an electrical product may cause a fire. Second, there is the inference that given the specific text of the "warning" given to Center, there was no reason for it to foresee a problem with Respondent's lamp if it was operated in a vertical position in an uncovered fixture (the way Center used the lamp). As previously established, not only was the warning quite vague as to the consequences of the

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[7] The majority is attempting to equate the instant facts with those in *Detroit Edison*, where the Court of Appeals held an electrical utility company should have foreseen the dangers associated with power plant pipe carrying steam at high temperatures and at high pressure. However, the instant case is quite different from *Detroit Edison*. First, there the plaintiff (Detroit Edison) was knowledgeable about power plant pipes and their purposes, and had even provided the pipe manufacturer with drawings and specifications for the pipe. 35 F.3d at 238. Here, there is no evidence Center knew anything about metal halide lamps. Second, power plant pipes are obviously far more dangerous than simple metal halide lamps. For example, Respondent's lamp operated at pressures of 50 p.s.i. In *Detroit Edison*, the pipe carried steam at 750 p.s.i., 35 F.3d at 238, well over ten times the pressure in Respondent's lamp!

lamp shattering during operation (App. 36 and 37 – Davidson Affidavit ¶5) it specifically stated Respondent's lamp could be safely operated in a vertical position in an uncovered fixture! (*See* App. 39 – Metalarc Lamp Warning). Given such an assurance by Respondent, Center had no reason to foresee Respondent's lamp would explode and cause extensive damage to Center's property.

The two inferences in question are at least equally plausible (the second, based on the specific text of the warning given to Center, is probably more so). As such, the Court of Appeals majority was not permitted to choose to follow the first, which is certainly more favorable to Respondent (the moving party). Rather, for the purposes of Respondent's Motion it should have selected the second, which was favorable to Petitioner (the non-moving party). The Court of Appeals should then have reversed the dismissal of Petitioner's case, leaving the ultimate decision on the merits to the jury.

With respect to the second economic loss doctrine element (an opportunity to negotiate), the Court of Appeals was confronted with three **undisputed** facts: a) Center never negotiated with Respondent regarding its purchase of the lamp in question, b) Center had no contact with Respondent when the lamp was purchased, and c) the lamp was purchased from a third-party supplier. (App. 29 – Robinson Declaration ¶6; App. 42 – District Court Opinion and Order). The Court of Appeals majority circumvented these facts by drawing the following inference:

> If a business entity buys a product in commercial quantities from a supplier, it has an opportunity to assess its risks and negotiate

> accordingly, particularly when, as here, the purchaser routinely deals with more than one supplier.

(App. 6 – Court of Appeals Opinion).

Unlike the inference regarding the first element, there are several reasons why the majority opinion's "multiple supplier" inference is not plausible. First, there is **absolutely no evidence** that by dealing with numerous suppliers of light bulbs over the years, Center was able to negotiate the terms of purchase of light bulbs. This is analogous to a situation where a homeowner purchases light bulbs for his/her home. One time the homeowner may buy a General Electric bulb from K-Mart, while the next time he/she may purchase a Westinghouse bulb from Home Depot. Obviously, this does not mean that the homeowner is able to negotiate the terms of his/her light bulb purchase with either K-Mart or Home Depot. Indeed, it is highly unlikely that the homeowner is able to so negotiate. In the instant case, there is no evidence that Center was in a different position.

Second, even if it is assumed that Center did negotiate with electrical product **suppliers**, this does not support an inference that Center could therefore negotiate with the **manufacturers** of electrical products sold by these suppliers. Here, there certainly was no evidence produced to support such an inference. Moreover, this is not realistic. Returning to the homeowner hypothetical, if the majority's reasoning is followed the homeowner is presumed to be able to negotiate the terms of his/her light bulb purchase with General Electric and Westinghouse. This simply does not occur. Similarly, like the

homeowner, Center had no opportunity to negotiate with Respondent when Center purchased Respondent's lamp. Indeed, Center had no contact with Respondent at all. There is no reason to assume that simply because Center purchased lamps from numerous third-party suppliers, such an opportunity miraculously appeared.

As discussed above, the majority opinion's inference regarding Center's opportunity to negotiate is not a plausible one. For this reason alone, the Court of Appeals' Opinion should be reversed.

Moreover, even if the numerous problems with the majority opinion's inference are ignored, there exists another plausible, yet conflicting, inference that can be drawn from the facts. As discussed several times above, Petitioner produced ample evidence that Center purchased Respondent's lamp from a third-party supplier, it never negotiated with Respondent regarding the purchase of the lamp, nor did Center have any contact with Respondent prior to its purchase of the lamp. It is hardly a stretch to infer from these **undisputed** facts that Center had no opportunity to negotiate with Respondent. In fact, this is a far more plausible inference. In any event, the existence of this second plausible inference results in there being two conflicting inferences regarding the second economic loss doctrine element. Once again, pursuant to this Court's numerous cases discussed above, for the purposes of Respondent's Motion the Court of Appeals (and the District Court) should have adopted the one more favorable to Petitioner. The majority opinion chose not to do so, requiring reversal by this Court.

E. This Court Should Grant This Petition

The foregoing discussion clearly establishes the Court of Appeals erred when it affirmed the dismissal of Petitioner's case. Without any explanation or rationale, the two judge majority chose to ignore this Court's well-established rules regarding the resolution of summary judgment motions. Had the Court of Appeals properly followed those rules, and drawn inferences from the facts in favor of Petitioner, the non-moving party, it would have reversed the District Court and reinstated this case.

Petitioner recognizes that the Court of Appeals committing reversible error does not in and of itself require that this Court grant its Petition. The grant of Certiorari is discretionary, and there are very real limits on this Court's available time and resources. However, Petitioner believes there are a number of reasons why the Court of Appeals' decision was so egregious, and the issue before the Court is so important, that the instant case is deserving of this Court's attention.

First, pursuant to Rule 10 of the Rules of the Supreme Court of the United States, the Court of Appeals' blatant disregard of the inference rule from *U.S. v Diebold, Inc.*, *Anderson* and this Court's other cases justifies granting this Petition. Specifically, the Court of Appeals' action constitutes the following "character of reasons" this Court considers as supporting the grant of Certiorari:

> (a) a United States court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a

> departure by a lower court, as to call for an exercise of this Court's supervisory power . . .
>
> * * *
>
> (c) . . . a United states court of appeals has . . . decided an important federal question in a way that conflicts with relevant decisions of this Court.

Rules 10(a) and 10(c) of the Rules of the Supreme Court of the United States.

Second, the rule that inferences from the facts are to be drawn in favor of the non-moving party plays a pivotal role in the resolution of summary judgment motions. The purpose of the summary judgment procedure is to test the validity of a claim – it is not to act as a substitute for trial. While the dismissal of cases where no genuine issues of fact exist is "an integral part of the Federal Rules as a whole," *Celotex Corporation v Catrett*, 477 U.S. 317, 327, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986), the desire to "weed out" unworthy cases must be balanced by caution against usurping the province of the trier of fact. Balance is achieved by placing a heavier burden on the moving party, as opposed to the non-movant, by drawing inferences from the facts in favor of the non-moving party.

If the Court of Appeals' decision is allowed to stand this balance will be destroyed, sending the wrong message to both litigants and judges alike. Defendants will be encouraged to file meritless summary judgment motions, seeking to dismiss cases even though genuine issues of material fact exist. They will do so because as there will always be the possibility that a District Court, following

the lead of the Court of Appeals in the instant case, will rush to judgment and dismiss a case. Judges will be encouraged to supplant the role of the jury, viewing inferences in favor of whichever party they believe should win. They may eventually go even further, making their own credibility determinations and weighing the evidence presented by the parties. If so, then summary judgment will replace the trial. Clearly, if left uncorrected the Court of Appeals' decision in this case represents the first step down the wrong road.

Finally, Petitioner respectfully submits the time has come for this Court to provide both judges and litigants with much needed guidance regarding the resolution of summary judgment motions in federal courts. It has been over a decade since this Court issued its trilogy of decisions – *Matsushita*, *Celotex* and *Anderson* – which redefined the standards of review for summary judgment motions. These decisions undeniably had a positive impact on summary judgment practice, as far greater numbers of summary judgment motions were granted in cases where there simply was no reason for the case to go to trial. However, courts have also struggled with the ramifications of these cases, not being sure how far they should go in deciding whether or not to grant summary judgment. At times, as in the instant case, courts have clearly crossed the line. If this Court grants this Petition and rules on the merits of Petitioner's appeal, lower courts and litigants will have a much better idea of what does, and what does not, justify the grant of summary judgment. This can only make the summary judgment procedure even more effective, to the benefit of all.

CONCLUSION

For the foregoing reasons, Petitioner Michigan Mutual Insurance Company respectfully requests that its Petition for Writ of Certiorari be granted, and upon further briefing and oral argument, the April 17, 1997 Opinion of the United States Court of Appeals for the Sixth Circuit be reversed, and this case be reinstated and remanded for further proceedings.

Respectfully submitted,

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APPENDIX

NOT RECOMMENDED FOR PUBLICATION

No. 95-1458

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHIGAN MUTUAL INSURANCE COMPANY, a Michigan Corporation, as subrogee of Center Manufacturing, Inc., **Plaintiff-Appellant,** v. OSRAM SYLVANIA, INC., a New York corporation, formerly known as GTE PRODUCTS CORPORATION, a New York Corporation, **Defendant-Appellee,** LITHONIA LIGHTING PRODUCTS, a Georgia Corporation, jointly and severally, **Defendants.**	**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN** **OPINION** (Filed Apr. 17, 1997)

BEFORE: NORRIS, DAUGHTREY, and MOORE, Circuit Judges.

ALAN E. NORRIS, Circuit Judge. In this diversity action, we must determine whether the economic loss doctrine, as construed by the courts of Michigan, precludes recovery in tort for damages resulting from a fire

allegedly caused by a defective metal halide lamp. The district court granted summary judgment in favor of defendant, concluding that the economic loss doctrine limited plaintiff's remedies to those provided by the Uniform Commercial Code ("UCC"). We agree with this assessment and therefore affirm.

Michigan Mutual Insurance Company brought this diversity action in an attempt to recover a portion of the $2,435,933.45 that it paid to its insured, Center Manufacturing, Inc., after a fire devastated Center's Michigan manufacturing plant. The fire occurred on July 9, 1991, when a metal halide lamp manufactured by defendant, Osram Sylvania, Inc., exploded and showered quartz particles on a stack of cardboard boxes. Center purchased the lamp, which was intended for industrial and commercial use, from a third-party supplier in 1984 and installed it in an open fixture made by Lithonia Lighting Products[1] later that year. Center installed and operated the lamp in a vertical position. According to plaintiff, Sylvania knew that its lamps might explode when operated vertically yet neglected to disclose this information until late 1985, after the lamp had been installed by Center.

In its complaint, Michigan Mutual, acting as Center's subrogee, invoked three theories of liability: express and implied warranty, as well as negligence. Michigan Mutual subsequently conceded that its warranty theories, which are governed by the UCC, were barred by the applicable four-year statute of limitation. M.C.L. § 440.2725. Thus, only the tort based negligence claim remained before the

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[1] Lithonia is no longer a party to this litigation.

district court. Relying upon the Michigan Supreme Court's decision in *Neibarger v. Universal Cooperatives, Inc.*, 439 Mich. 512, 486 N.W.2d 612 (1992), the district court concluded that the economic loss doctrine precluded plaintiff's tort claim because it restricted plaintiff's recovery to the remedies provided by the UCC.

Neibarger defines the economic loss doctrine in the following terms:

> [W]here a plaintiff seeks to recover for economic loss caused by a defective product purchased for commercial purposes, the exclusive remedy is provided by the UCC, including its statute of limitations.
>
> . . . .
>
> . . . [T]he UCC provides remedies sufficient to compensate the buyer of a defective product for direct, incidental, and consequential losses, including property damage. Where damage to other property was caused by the failure of a product purchased for commercial purposes to perform as expected, and this damage was within the contemplation of the parties to the agreement, the occurrence of such damage could have been the subject of negotiations between the parties.

439 Mich. at 527-32, 486 N.W.2d at 618-20 (citations omitted). As this passage makes clear, the applicability of the doctrine often hinges upon whether the damage caused by the product falls within the reasonable contemplation of the parties. The reporters of the Restatement (Third) of Torts sum up the difficulty posed by this aspect of the doctrine:

> Controversy arises when an item of property, though physically distinct from the defective product, is used with or dependent upon it, and the damage to the item caused by the product failure arises from this relation. Significant authority holds that in this situation, where the harm to other tangibles is within the actual, or sometimes merely reasonable, contemplation of the parties, the remedies embodied by the U.C.C. will be the sole recourse of the buyer for what is characterized as his purely "economic loss." . . . The crux of the issue is whether, when damage to property distinct from the product is found, it should be further scrutinized to determine if, regardless of its physical character, it is essentially economic loss.

Restatement (Third) of Torts: Product Liability § 6 cmt. e, 1 (Tentative Draft No. 2, 1995) (citation to *Neibarger* and other cases omitted).

In applying *Neibarger*, this circuit has focused on the nature of the product's use and the sophistication of the buyer and seller, rather than upon the extent of the damage. *Detroit Edison Co. v. NABCO, Inc.*, 35 F.3d 236, 242 (6th Cir. 1994). Where the product is purchased for use in a commercial setting and both parties are business entities, it is more likely that the consequences of the product's potential failure are within the contemplation of the parties. Thus, in *Detroit Edison* this court determined that recovery in tort for an explosion caused by a faulty section of reheat pipe which extensively damaged a power plant was barred by the economic loss doctrine:

> [I]t is foreseeable that pipes, such as the one that ruptured at the Monroe [power plant] facility, that convey steam at high temperatures and

> high pressures could explode upon failure. The consequences of these inherent hazards were not beyond Detroit Edison's contemplation and Detroit Edison should have internalized some of the cost of the risks attendant to doing business.

Id.

We are hard-pressed to distinguish *Detroit Edison*, which read *Neibarger* expansively, from the facts now before us. Although Michigan Mutual advances the argument that Center acted like a consumer buying a light bulb in a hardware store when it purchased the lamp at issue, that analogy fails to hold up to close inspection. First, while the lamp was not integral to Central's manufacturing process, it was purchased in commercial quantities and was used in a commercial setting. Second, it seems to us that the inherent fire hazard associated with a 400-watt halide lamp is no less within the contemplation of the parties than is the inherent danger posed by a section of reheat pipe. Finally, although Center did not purchase the lamp directly from Sylvania, lack of privity does not necessarily bar application of the economic loss doctrine. *Sullivan Indus., Inc. v. Double Seal Glass Co., Inc.*, 192 Mich. App. 333, 341-44, 480 N.W.2d 623, 628-29 (1991); *accord McCann v. Brody-Built Constr. Co., Inc.*, 197 Mich. App. 512, 517, 496 N.W.2d 349 (1992) ("plaintiffs' negligence cause of action is barred by the economic-loss doctrine, which precludes them from recovering in tort where their losses are wholly economic, even in the absence of privity") (concurrence); *but see Huron Tool and Eng'g Co. v. Precision Consulting Serv.*, 209 Mich. App. 365, 372, 532 N.W.2d 541, 545 (1995) (economic loss doctrine does not apply where there is no contractual relationship

between the parties) (dictum). If a business entity buys a product in commercial quantities from a supplier, it has an opportunity to assess its risks and negotiate accordingly, particularly when, as here, the purchaser routinely deals with more than one supplier. Thus, in our view, the district court properly applied the economic loss doctrine, as it has emerged in Michigan, to the facts of this case.

Accordingly, the judgment of the district court is **affirmed.**

95-1458, ***Michigan Mutual Insurance Co. v. Osram Sylvania, Inc.***

MARTHA CRAIG DAUGHTREY, CIRCUIT JUDGE, DISSENTING. In ruling for the defendant on summary judgment, the district court over-extended Michigan's "economic loss doctrine" and misinterpreted the rationale behind that doctrine. For this reason, I respectfully dissent from the majority's decision.

The plaintiff in this case, Michigan Mutual Insurance Company, is the subrogee of Center Manufacturing, Inc. Interpretation of the relevant facts of this case in a light most favorable to the plaintiff-appellant, as required on summary judgment, establishes a fairly straightforward series of events leading up to this suit. Center Manufacturing purchased a metal halide lamp from a third party in 1984, a lamp manufactured by the defendant, Osram Sylvania, Inc. In 1991, this halide lamp exploded, showering pieces of quartz onto a stack of cardboard boxes in Center Manufacturing's plant. The resulting fire destroyed most of the plant, for which the Michigan

Mutual Insurance Company paid well over two million dollars. Michigan Mutual then sued Osram Sylvania for breach of warranty and negligence, seeking to recover all of the money it paid for Center Manufacturing's gutted plant.

In its summary judgment order, the district court correctly held that Michigan Mutual's warranty claim under the Uniform Commercial Code was untimely. The Michigan UCC has a four-year statute of limitations, with no tolling for discovery, which effectively barred any contract claim brought against Osram Sylvania. M.C.L. § 440.2725. That left Michigan Mutual's tort-based products liability claim as the sole legal theory under which Osram Sylvania could be liable. The district court then interpreted the Michigan case law governing the economic loss doctrine and determined that, under that doctrine, no tort-based claim could stand. The district court reasoned that the halide lamp had been bought for "commercial purposes" and that the resulting damage was incidental or consequential to the lamp's malfunction. Finding that the plaintiff had suffered only an "economic loss," a risk that it supposedly could have anticipated when it purchased the lamp, the district court held that the doctrine of contract law provided the only remedy and dismissed the remaining tort-based claim. A careful study of the economic loss doctrine, however, indicates that the Michigan Supreme Court never intended for the rule to go this far.

In *Neibarger v. Universal Cooperatives, Inc.*, 439 Mich. 512, 486 N.W.2d 612 (1992), the court clarified its economic loss theory, reasoning that "where a plaintiff seeks

to recover for economic loss caused by a defective product purchased for commercial purposes, the exclusive remedy is provided by the UCC, including its statute of limitations." *Id.* at 527-28, 486 N.W.2d at 618. Compared to other jurisdictions, Michigan's economic loss doctrine is noticeably more broad. It not only includes damage to the product itself, but may also include damage to other property when "this damage was within the contemplation of the parties to the agreement." *Id.* at 532, 486 N.W.2d at 620. In contrast, most other jurisdictions limit the economic loss doctrine to those cases in which only the product itself is damaged or the damage is closely related to the use of that product. *See, e.g., East River S.S. Corp. v. Transamerica Deleval, Inc.*, 476 U.S. 858, 871 (1986) (admiralty law); *Miller v. United States Steel Corp.*, 902 F.2d 573, 574-76 (7th Cir. 1990) (applying Wisconsin law); *Kershaw County Bd. of Educ. v. United States Gypsum Co.*, 302 S.C. 390, 393, 396 S.E.2d 369, 371 (1990); *Clark v. Int'l Harvester Co.*, 99 Idaho 326, 333, 581 P.2d 784, 791 (1978).

So, while most jurisdictions limit their economic loss doctrine by the type of damage involved, Michigan does not, instead focusing attention on the type of transaction involved. When it is a commercial transaction, in which the parties have or could have negotiated an allocation of foreseeable risks, the remedies of contract law control. When it is a consumer transaction, in which the buyer does not have the opportunity to negotiate warranties and disclaimers, then tort-based products liability law still controls. *Neibarger*, 439 Mich. at 523, 486 N.W.2d at 616. Michigan differentiates between the two circumstances for sound reasons of social policy: The courts want to encourage the manufacture of safe products for

consumers by allocating the risk of dangerous products among manufacturers. In commercial transactions, however, where all the parties have the knowledge and power to negotiate the terms of the sale, the court's ruling purposefully allows those parties to allocate risks among themselves. *Id.* at 526, 486 N.W.2d at 617-18 (citing *Consumers Power Co. v. Mississippi Valley Structural Steel Co.*, 636 F.Supp. 1100, 1105 (E.D. Mich. 1986)).

In this particular case, a sophisticated commercial party purchased a lamp for use in its manufacturing plant. At a superficial level, one could blindly apply Michigan's economic loss doctrine to this situation and declare that the UCC provides the only remedy. If one employs the true rationale of the economic loss doctrine, however, these facts fall well outside of the Michigan Supreme Court's apparent intent. Here, we have a business acting as a consumer, purchasing a lamp from a third party, not the manufacturer. From the plaintiff's description of the facts, this third-party sale did not involve any negotiations, nor did it include discussions of warranties, disclaimers, or risks of sudden explosions and fires. Center Manufacturing purchased this lamp the same way any individual consumer would buy a light bulb off a store shelf. The lamp was not a part of its manufacturing process, nor was it a product that fell within the business expertise of Center Manufacturing. The potential negotiations that the economic loss doctrine requires as its premise simply did not and could not exist in this case.

Instead, we have here a consumer who purchased a product that malfunctioned in a way no ordinary buyer could have anticipated. Under the logic of the Michigan Supreme Court's *Neibarger* opinion, it falls outside the

realm of the economic loss doctrine. *See also Detroit Edison Co. v. NABCO, Inc.*, 35 F.3d 236, 241 (6th Cir. 1994) (applying Michigan's economic loss doctrine and pointing out that it involves only those damages "within the contemplation of the parties"). In a case subsequent to *Neibarger*, the Michigan courts recognized that a contracting party cannot be held accountable for risks that neither side would anticipate. Because these dangers are considered outside the scope of the contract, so the economic loss doctrine does not apply, and remedies based in tort law are still available. *Detroit Bd. of Educ. v. Celotex Corp.*, 196 Mich. App. 694, 704-05, 493 N.W.2d 513, 518-19 (1992), *lv. app. denied*, 444 Mich. 908, 512 N.W.2d 318 (1993) (removing asbestos claims from the economic loss rule).

Considering the particular facts of this case and the basis of Michigan's economic loss doctrine, I am convinced that the rule should not apply in this case. The economic loss doctrine rests on a sound social policy rationale, but that rationality survives only in the proper context. In this case, we have a consumer purchasing a lamp from a third party without the benefit of negotiations or the expertise that contract law expects. The risk associated with this malfunctioning product appropriately rests with manufacturer, for there is no reasonable expectation that a distant purchaser will seek a separate warranty for a sudden light bulb explosion. For this reason, I would reverse the summary judgment holding of the district court, and I respectfully dissent from the majority's decision to affirm that holding.

No. 95-1458

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHIGAN MUTUAL INSURANCE COMPANY, Plaintiff-Appellant, v. OSRAM SYLVANIA, INC., A NEW YORK CORPORATION, FORMERLY KNOWN AS GTE PRODUCTS CORPORATION, Defendant-Appellee, LITHONIA LIGHTING PRODUCTS, A GEORGIA CORPORATION, Defendant.	)	ORDER (Filed May 27, 1997)

BEFORE: NORRIS, DAUGHTREY, and MOORE, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is

denied. Judge Daughtrey would grant rehearing for the reasons stated in her dissent.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHIGAN MUTUAL INSURANCE COMPANY, a Michigan corporation, as subrogee of Center Manufacturing, Inc.,

Plaintiff,

-vs-

OSRAM SYLVANIA, INC., a New York corporation, formerly known as GTE PRODUCTS CORPORATION, a New York Corporation, and LITHONIA LIGHTING PRODUCTS, a Georgia corporation, jointly and severally,

Defendants.

HON.

Case No. 1:93-CV-541

(Filed July 13, 1993)

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COMPLAINT
DEMAND FOR JURY TRIAL

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHIGAN MUTUAL INSURANCE COMPANY, a Michigan corporation, as subrogee of Center Manufacturing, Inc.,

Plaintiff,

-vs-

OSRAM SYLVANIA, INC., a New York corporation, formerly known as GTE PRODUCTS CORPORATION, a New York Corporation, and LITHONIA LIGHTING PRODUCTS, a Georgia corporation, jointly and severally,

Defendants.

HON.

Case No.

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COMPLAINT

NOW COMES Plaintiff, Michigan Mutual Insurance Company, by and through its attorneys, Denenberg, Tuffley & Jamieson, P.C., and for its Complaint against the Defendants, state as follows:

JURISDICTIONAL AND GENERAL ALLEGATIONS

1. Plaintiff, Michigan Mutual Insurance Company, is an insurance corporation organized under the laws of the State of Michigan, with its principal place of business in the City of Detroit, and at all relevant times herein, systematically and continuously engaged in the business of insurance in the State of Michigan and is a citizen of the State of Michigan.

2. The Defendant, Osram Sylvania, Inc., is a New York [sic] and a successor corporation to the company formerly known as GTE Products Corporation, a New York Corporation, with its principal place of business in the City of Danvers, State of Massachusetts, which at all relevant times herein, conducted systematic and continuous business in the State of Michigan, and is not a citizen of the State of Michigan.

3. The Defendant, Osram Sylvania, Inc., formerly known as GTE Products Corporation, at all pertinent times herein, was engaged in the design, manufacture, fabrication, production, distribution, installation, testing, inspection, servicing and sale of industrial lighting lamps, including but not limited to Metal Halide lamps.

4. The Defendant, Lithonia Lighting Products, is a Georgia corporation with its principal place of business

in the City of Cleveland, State of Ohio, and all relevant times herein conducted systematic and continuous business in the State of Michigan and is not a citizen of the State of Michigan.

5. The Defendant, Lithonia Lighting Products, at all pertinent times herein, was engaged in the design, manufacture, fabrication, production, distribution, installation, testing, inspection, servicing and sale of industrial lighting fixtures, including but not limited to: Hi Tek Metal Halide fixtures.

6. The amount in controversy exceeds the sum of Fifty Thousand Dollars ($50,000), exclusive of interest, costs and attorney fees.

7. The acts, transactions and occurrence that are subject of this Complaint arose within the County of Kent, State of Michigan.

8. This Court has Subject Matter Jurisdiction based upon Diversity of Citizenship as set forth in 28 USC § 1332.

9. On or about July 9, 1991, a Metal Halide lamp and Metal Halide fixture manufactured, designed, fabricated, produced, distributed, tested, installed, inspected, serviced and sold, by the respective Defendants, failed and caused a fire at a business known as Center Manufacturing, Inc., located at 990 – 84th Street, S.W., Byron Center, Michigan, 49315.

10. Prior to July 9, 1991, Plaintiff, Michigan Mutual Insurance Company issued its Policy No. CPP 0356527, insuring the interests of Center Manufacturing, Inc. in

certain property located at 990 – 84th Street, S.W., Byron Center, Michigan, against fire and other perils.

11. As a result of the fire of July 9, 1991, Center Manufacturing, Inc., made claim under Policy No. CPP 0356527, for loss and damage to its building, contents, loss of earnings, extra expenses or other insurance benefits and the Plaintiff was obligated to pay and did pay the sum of Two Million Four Hundred Thirty-Five Thousand Nine Hundred Ninety-Three Dollars and 45/100 ($2,435,993.45) to its insured, Center Manufacturing, Inc.

12. Pursuant to the claim made against Plaintiff by its insured, Center Manufacturing, Inc., and payment to its insured, Center Manufacturing, Inc., the Plaintiff is legally, contractually and equitably subrogated to the rights of its subrogee against the Defendants.

COUNT 1
(Breach of Express and Implied Warranties in Tort and/or Contract)

13. Plaintiff Michigan Mutual hereby incorporates by reference paragraphs 1 through 12 of this Complaint the same as if they were set forth herein.

14. In the course of Defendants' design, manufacture, fabrication, production, distribution, installation, inspection, testing, service and/or sale of Metal Halide Lamps and Metal Halide Fixtures, (hereinafter collectively referred to as "the products" or "their products"), the Defendants, expressly and impliedly warranted in law and/or in contract to Plaintiff's subrogor and other foreseeable users of their products, that they were free from defects, were reasonably fit for the purposes and

uses, anticipated, intended or reasonably foreseeable and that the products were of merchantable quality and reasonably fit for their intended use.

15. Plaintiff's subrogor relied on Defendants' express and/or implied warranties, however, the Defendants breached the express and implied warranties, described herein in that they improperly and unreasonably designed, manufactured, fabricated, produced, distributed, installed, tested, inspected, serviced and/or sold, the products with numerous product defects so that the products were not reasonably fit for the purposes and uses, anticipated, intended or reasonably foreseeable, were not of merchantable quality or fit for their intended use, in several ways, including, but not limited to the following:

A. When utilized in a normal, intended, foreseeable and reasonable fashion the products failed;

B. The products received inadequate pre- and post-manufacture testing and inspections so as to guard against the hazardous conditions that caused the fire;

C. The products did not possess adequate safety features, including but not limited to, lamp enclosures, in accordance with applicable standards or otherwise so as to guard against the hazardous conditions which caused the fire;

D. The products were defective because the Defendants, at all material times herein, failed to warn, or in the alternative, failed to adequately warn the Plaintiff's subrogor or others of known, non-obvious hazards

(or those that should have reasonably been known), associated with the anticipated use, service, operation, maintenance of the products;

E. The products were defective because the Defendants failed to warn, or in the alternative, failed to adequately warn Plaintiff's subrogor or others of the hazards associated with foreseeable misuses of the products or otherwise failed to warn, or failed to adequately warn, the Plaintiff's subrogor or others of the products' unreasonably dangerous propensities or otherwise;

F. The products were defective in that the Plaintiff's subrogor was not provided adequate information or instructions regarding the use, operation, maintenance, and/or service of the products, so as to guard against the hazardous condition which caused the fire;

G. The Defendants' products were unreasonably and imminently dangerous products and/or instrumentalities for which the utmost care was required by Defendants to protect Plaintiff's subrogor or others from harm and damage;

H. The Defendants misrepresented, expressly or impliedly, that their products were safe for use indoors, in areas where combustible materials were stored, when in fact the installation and use of their products in such areas were unreasonably dangerous and ultra-hazardous.

16. The products left the care, custody and control of the Defendants in the aforementioned defective condition and remained in the same condition until July 9, 1991.

17. As a direct and proximate result of the foregoing breaches of warranty and product defects, on or about July 9, 1991, the products failed and caused a fire with resultant damage to Plaintiff and Plaintiff's subrogor, including but not limited to, fire damage to the property located at the business owned and operated by Plaintiff's subrogor.

WHEREFORE, the Plaintiff, Michigan Mutual Insurance Company respectfully requests Judgment against the Defendants, jointly and severally, in the amount of Two Million Four Hundred Thirty-Five Thousand Nine Hundred Ninety-Three Dollars and 45/100 ($2,435,993.45), together with interest, costs and attorney fees as may be awarded by law.

COUNT II
(Negligence)

18. Plaintiff Michigan Mutual hereby incorporates by reference paragraphs 1 through 17 of this Complaint, the same as if they were set forth herein.

19. Defendants owed certain duties to Plaintiff's subrogor (and Plaintiff) to design, manufacture, fabricate, produce, distribute, install, inspect, test, service and/or sell the products with reasonable care and so as to eliminate unreasonable and foreseeable risks of harm or injury to Plaintiff's subrogor or Plaintiff.

20. In breach of the duties owed and contrary to common law, the Defendants by reason of the conduct of their agents, employees and representatives, were negligent in several ways, including but not limited to, the following:

A. The Defendants failed to design, manufacture, fabricate, produce, distribute, install, inspect, test, service and/or sell their products with reasonable care so as to eliminate unreasonable and foreseeable risks of harm to Plaintiff's subrogor;

B. The Defendants negligently designed, manufactured, fabricated, produced, distributed, installed, inspected, tested, serviced and/or sold the products, in that they were inadequate to withstand normal operating conditions, forces and stresses when utilized in a foreseeable, intended and reasonable fashion;

C. The Defendants negligently designed, manufactured, fabricated, produced, distributed, installed, inspected, tested, serviced and/or sold the products in that they lacked adequate pre- and post-manufacture testing and inspections so as to guard against the hazardous conditions that caused the fire;

D. The Defendants negligently designed, manufactured, fabricated, produced, distributed, installed, inspected, tested, serviced and/or sold the products without appropriate safety devices, including but not limited to, lamp enclosures;

E. The Defendants, at all material times herein, failed to warn, or in the alternative, failed to adequately warn the Plaintiff's subrogor or others of known, non-obvious hazards (or those that should reasonably have been known) associated with the anticipated use, operation, service or maintenance of their products;

F. The Defendants, at all material times, failed to warn, or in the alternative, failed to adequately warn Plaintiff's subrogor or others of the hazards associated with foreseeable misuses of the products, or otherwise failed to warn, or failed to adequately warn, the Plaintiff's subrogor or others of the products' unreasonably dangerous propensities, or otherwise;

G. The Defendants negligently failed to provide Plaintiff's subrogor with adequate and sufficient information or instructions as to the safe use, operation, maintenance and/or service of their products;

H. The Defendants negligently designed, manufactured, fabricated, produced, distributed, installed, inspected, tested, serviced and/or sold the products in that they were unreasonably and imminently dangerous products and/or instrumentalities, for which the utmost care was required by Defendants to protect Plaintiff's subrogor and others from harm and damage.

21. As a direct and proximate result of the acts/omissions of the Defendants described herein, on or about July 9, 1991, their products failed and caused a fire with resultant damages to the Plaintiff and Plaintiff's

subrogor, including but not limited to, damage to the property located at the business owned and operated by Plaintiff's subrogor, Center Manufacturing, Inc.

WHEREFORE, the Plaintiff Michigan Mutual Insurance Company respectfully requests Judgment against the Defendants, jointly and severally, in the amount of Two Million Four Hundred Thirty-Five Thousand Nine Hundred Ninety-Three Dollars and 45/100 ($2,435,993.45), together with interest, costs and attorney fees as may be awarded by law.

DATED: July 13, 1993

DENENBERG, TUFFLEY & JAMIESON, P.C.
Attorneys for Plaintiff

By /s/ Charles R. Tuffley
Charles R. Tuffley
(P-21613)

By /s/ Michelle F. Kitch
Michelle F. Kitch
(P-35498)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHIGAN MUTUAL INSURANCE COMPANY, a Michigan corporation, as subrogee of Center Manufacturing, Inc.,

Plaintiff,

-vs-

OSRAM SYLVANIA, INC., a New York corporation, previously known as GTE PRODUCTS CORPORATION, a New York Corporation, and LITHONIA LIGHTING PRODUCTS, a Georgia corporation, jointly and severally,

Defendants.

HON.

Case No.

CHARLES R. TUFFLEY (P-21613)
Attorney for Plaintiff
Denenberg, Tuffley & Jamieson, P.C.
28th Floor, 3000 Towne Center
Southfield, MI 48075-1369
313/358-5500

MICHELLE F. KITCH (P-35498)
Attorneys for Plaintiff

DEMAND FOR JURY TRIAL

NOW COMES Plaintiff, Michigan Mutual Insurance Company by its attorneys, Denenberg, Tuffley & Jamieson, P.C., and demands a trial by jury of all the issues in this action.

DATED: July 13, 1993

DENENBERG, TUFFLEY &
JAMIESON, P.C.
Attorneys for Plaintiff

By /s/ Charles R. Tuffley
Charles R. Tuffley
(P-21613)

By /s/ Michelle F. Kitch
Michelle F. Kitch
(P-35498)

Exhibit 4

DECLARATION OF PAUL ROBINSON

I, Paul R. Robinson, hereby declare as follows:

1. Prior to my retirement in September 1991, I was employed for thirty-five (35) years in various capacities by the Lighting Products Group of GTE Products Corporation and its predecessor companies (hereinafter collectively referred to as "GTE Sylvania" or "the company"). I make this declaration based upon my personal knowledge and a review of the company's records over which I was charged with the responsibility of maintaining and archiving during the course and in the scope of my employment with the company.

2. In 1984, I was assigned to the position of Special Projects Manager at the company's Sylvania Lighting Center located in Danvers, Massachusetts. In this position, I received various special assignments from, and directly reported to, the Director of Manufacturing for the Lighting Products Group, J.R. Morin.

3. During the spring of 1985, I was assigned by Mr. Morin to work full-time with the newly established Metalarc Containment Team. The containment team was formed in 1985 in response to the company's growing awareness over time that its Metalarc brand metal halide lamps were not always operated in suitably enclosed fixtures and that, in some instances and contrary to the company's recommendations, the lamps were allowed to burn continuously beyond their rated life. Under such circumstances, there was a remote possibility that the lamps may be subject to a type of failure in which the arc

tube, operating at a pressure of approximately 50 psi, bursts and shatters the outer lamp jacket or outer glass encasement. When such a nonpassive lamp failure occurred, the hot quartz particles (as high as 1832 degrees F, 1000 degrees C) and the outer jacket glass particles could be discharged against the fixture's enclosure or into the environment if the fixture was open.

4. The Project Manager of the containment team was J.R. Morin. The team was staffed by representatives from various Lighting Group departments, both technical and nontechnical. Many members of the team devoted virtually all of their time to the group's day-to-day activities while other members were involved on an as-needed basis or in a [sic] overall general supervisory capacity. The general organization of the team is depicted on the attached Metalarc Containment Team Organization Chart, attached hereto as Exhibit A.

5. Beginning in 1985 and continuing through 1988, I held the full-time position of the Administrator and Communications Center Manager of the containment team. In this capacity, I was responsible for, among other things, the commuication [sic], coordination and/or participation in discussions of the group's activities, some of which included:

a. the discussion and development of information regarding the company's prior experience with metal halide arc tube ruptures;

b. research and development of new technology which would be able to contain non-passive lamp failures;

c. the development of revised Metalarc product warnings and operating instructions;

d. the communication of the revised Metalarc product warnings and operating instructions to all distributors, fixtures manufacturers, contractors, and other metal halide lamp products users through direct mail, sales force field visits, press releases, the attachment of adhesive revised labels to inventory stocks of Metalarc products, and the publication of the revised warnings and operating instructions in all trade media in which the company had ever advertised its metalarc lamps;

e. the compilation and development of mailing lists of all possible end-users of the company's Metalarc products and direct mail contact to all such identified users regarding the possibility of non-passive failure and the revised Metalarc product warnings and operating instructions;

f. the development of a communications center responsible for sending direct mail notification to all identified Metalarc end-users and responding to customer inquiries on the toll-free containment telephone lines;

g. the development of a computer data base wherein information regarding all identified potential end-users was recorded as well as the generation of all direct mail notifications, all telephone and field contacts, and the end-users' replies to the notification;

h. establish contact with Underwriters Laboratories (UL) regarding the inadequacy of UL Standard 1572 for testing metal halide fixture enclosures.

6. As the Administrator and Communications Center Manager, I had significant personal involvement in the containment team's efforts to identify potential end-users of Metalarc products. Because the company had never sold its Metalarc products to the ultimate end-user but rather, sold its products through distributorships and fixture manufacturers, the containment team undertook the following measures to identify potential end-users as well as to encourage the assistance of its field sales personnel, distributors and fixture manufacturers in identifying such potential end-users:

a. Via written correspondence and regional and district meetings in 1985, apprised all of its field sales and support personnel of the possibility for non-passive lamp failure and the company's revised product warnings and operating instructions. All personnel were instructed to supply lists of any Metalarc applications in open fixtures which they had records or memories of, and to contact distributors within their districts in order to encourage their cooperation in supplying possible end-user mailing list information to the company. As an incentive for distributor cooperation, field personnel were authorized to compensate the distributors for their record searches if requested to do so. See, e.g., Metalarc Enclosure Program – Final Report, attached hereto as Exhibit B.

b. In November 1985, letters with revised warnings attachments were sent to all Metalarc distributors. The cover letter specifically requested that each distributor search its records and compile a list of all Metalarc end-users. The notification also informed the distributors that the company had temporarily suspended shipments of Metalarc lamps until revised warnings and operating

instruction stickers could be affixed to lamp wrappers in Sylvania inventories. The distributors were asked to likewise hold all lamp shipments until they received the stickers from the company sales representative the following week. See Letter with revised warnings attachments to Sylvania Large Lamp Distributors, attached hereto as Exhibit C.

c. Beginning in October 1985, representatives from GTE Sylvania began making personal contact with metal halide fixture manufacturers who purchased Metalarc lamps for inclusion with their fixtures. The representatives reviewed the revised Metalarc warnings and operating instructions with each fixture manufacturer, and requested that lists of end-users be provided to the company. See, e.g., Metalarc Enclosure Program – Final Report, attached supra as Exhibit C; Memorandum re: Trip Report – Hi-Tek, attached hereto as Exhibit D.

d. In 1985 and, again, in 1986, the company placed advertisements in all publications in which it had previously advertised Metalarc products. The ads alerted metal halide lamp users and/or vendors regarding the possibility of non-passive failures, the revised Metalarc warnings and operating instructions, and the availability of a toll-free telephone assistance line. See, e.g., Metalarc Enclosure Program – Final Report, attached supra as Exhibit B; Memorandum re: Metalarc Warning Ads, attached hereto as Exhibit E. In addition, the company issued a press release for formal November 1985 announcement. Metalarc Enclosure Program – Final Report, attached supra as Exhibit B.

e. During 1985 and 1986, searches of internal invoices for "lamps with Fixtures" covering the prior three (3) years were conducted as such invoices had information regarding end-users in the "ship to" entry. Similarly, reviews of all pricing claims for the prior three (3) years were conducted as end-users were identified in such claims, as well as reviews of the company's Fall River fixture division's invoices for all open 400 and 1000 watt fixtures which had been shipped to the job site. Metalarc Enclosure Program – Final Report, attached supra as Exhibit B.

7. As administrator of the containment team and the communications center manager, I was also involved in the design and development of a computer data base wherein the end-user information received from all sources including, but not limited to, those described above in paragraph 5, was manually inputted and each entry was assigned a customer number. The computer program was designed so that mailing labels could be generated for each customer entry. Beginning in December 1, 1985 and continuing through 1986, each user listed on the data base was sent a first warning and informational packet via first class mail. The date of mailing for each end-user was recorded in the data base.

The first end-user warning and informational packet contained the following four (4) enclosures:

a. Cover letter to Lighting User which described the potential for non-passive failure and a summary of the packet's enclosures. In addition, the letter urged the recipient to call the toll-free telephone numbers listed if

he/she had any questions regarding the notice. See Letter to Lighting User, attached hereto as Exhibit F.

b. A document entitled "IMPORTANT WARNING FOR USERS OF SYLVANIA METALARC, SUPER METALARC, AND SWINGLINE LAMPS." This document explained the revised Metalarc warnings and operating instructions, as well as advised of the availability (and suitability for use in open vertical fixtures) of a new, teflon coated lamp product, developed by the containment team, as an alternative. See Important Warning, attached hereto as Exhibit F.

c. A document entitled Identification Sheet. This attachment provided a written and graphic description of the Sylvania Metalarc and Super Metalarc Lamps. See Identification Sheet, attached hereto as Exhibit F.

d. A pre-paid postage Sylvania Lamp Survey Card. This attachment contained six (6) questions regarding the recipient's use of metal halide lamps, as well as a space to indicate the name of the company lighting contact and telephone number. See Sylvania Lamp Survey Card, attached hereto as Exhibit F.

8. The information contained in the answers to each returned Sylvania Lamp Card Survey was entered by the communication center clerks into the database file maintained for each end-user listed on the computer. The same information was sought by the communication center's telephone operators from end-users who replied to the end-user warning and informational packet, advertisements or any other form of notice through the toll-free assistance telephone line. Similar to those responding by the Lamp Survey Card, the end-user answers provided to

the telephone operators were entered into each user's respective database file. See, e.g., Metalarc Communications Center response code sheet, attached hereto as Exhibit G.

9. The computer containment data base was also programmed to automatically repeat, up to two (2) times, the end-user mailing described in paragraph 7 (a) through (d) above if the Metalarc communications center did not receive a reply at a predetermined interval, either through receipt of the Sylvania Lamp Survey Card or an end-user initiated telephone call to the toll-free assistance line. The second and third follow-ups were sent via registered mail. Once a response was received by the communications center, GTE Sylvania field personnel were urged to make personal visits to the respondent in conjunction with the local distributor.

10. All responses to the Sylvania Lamp Survey Card or records of end-user initiated telephone calls were maintained in a computer data base under my supervision. Upon my review of the data base, I located the record on Center Manufacturing, Inc., which reflects that Center was sent the first warnings and information packet on August 21, 1986, with a follow-up mailing on October 14, 1986 after no response was received from the initial mailing. The Lamp Survey Card was returned by Center and received by the communications center on November 12, 1986. A Mr. D. Damvelt was identified as the lighting contact person at Center Manufacturing, and Center indicated that it was a current user of 400 watt metal halide lamps in open vertical burning fixtures. See, e.g., Metalarc Communication Center Enduser Record Maintenance and Lamp Information Record Maintenance,

attached hereto as Exhibit H. Accordingly, this record confirms that Center Manufacturing, Inc. acknowledged its receipt of the complete Metalarc warnings and product information package as reflected in Exhibit F.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on the 27th day of October, 1994.

/s/ Paul R. Robinson
Paul R. Robinson

Exhibit 8

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHIGAN MUTUAL INSURANCE COMPANY, a Michigan corporation, as subrogee of Center Manufacturing, Inc.,

Plaintiff,

vs.

OSRAM SYLVANIA, INC., a New York corporation, formerly known as GTE PRODUCTS CORPORATION, a New York Corporation, and LITHOMIA LIGHTING PRODUCTS, a Georgia corporation, jointly and severally,

Defendants.
_____/

Case No. 1:30-CV-541

HON.
WENDELL A. MILES

AFFIDAVIT OF BURTON Z. DAVIDSON, PH.D, P.E.

STATE OF NEW JERSEY)
) SS
COUNTY OF SOMERSET)

Burton Z. Davidson, Ph.D., P.E., being first duly sworn, deposes and says as follows:

1. I have been retained by Plaintiff, Michigan Mutual Insurance Company, to review and evaluate certain literature and documentation regarding a product known as the Sylvania Metalarc Metal Halide Lamp, which is manufactured by Defendant, Osram Sylvania, Inc. (formerly known as GTE Products Corporation) (hereinafter referred to as "Sylvania").

2. Attached as Exhibit A is a copy of my current resume which outlines my academic training, professional experience, areas of expertise, achievements, publications and other background information.

3. I have been duly qualified as an expert on numerous occasions by courts of law in the areas of safety and health engineering, product safety engineering, the safety need for warnings and instructions, amongst numerous other related areas.

4. In reaching the opinions expressed in this Affidavit, I have reviewed materials supplied by Sylvania regarding information provided to distributors, fixture manufacturers and end users regarding its Metalarc metal halide lamp. This includes, but is not limited to, a Metalarc product warning provided by Sylvania as of 1981 (Exhibit B), an expanded Metalarc product warning provided by Sylvania starting in late 1985, and literature and other documentation regarding these warnings and Sylvania's Metalarc lamps.

5. It is my opinion that the 1981 Metalarc product warning provided by Sylvania was inadequate with respect to warning end users of fire dangers associated with the normal use of Metalarc lamps. The product

warning was inadequate in several respects, including, but not limited to, the following:

A. While the 1981 warning does mention that lamps may shatter during operation, it is silent as to the exposure zone and consequences of such an event (hot quartz are tube particles leading to personal injury or fire of nearby combustibles);

B. The 1981 warning refers to "non-passive failures," without providing the end user (commercial or otherwise) with any definition of what a non-passive failure may be (a non-passive failure is, essentially, an explosion, leading to personal injury or fire of nearby combustibles); and

C. Unlike the 1985 warning, the 1981 warning does not recommend that Metalarc lamps only be operated in enclosed (covered) fixtures. Indeed, in the "Burning Positions" diagram accompanying the 1981 warning, Sylvania indicates that the Metalarc lamp can be safely operated in a vertical position in an open (uncovered) fixture, which position Sylvania knew was an unsafe position leading to a fire danger.

6. It is my opinion that based upon literature and other materials regarding the 1981, 1985 and other Sylvania Metalarc product warnings, Sylvania was aware of the dangers described in is 1985 Metalarc product warning at least as of 1981. This knowledge should have been communicated to end users of Metalarc lamps at that time, as the hazards associated with Metalarc lamps described in the 1985 product warning were not obvious, or readily discernable, to the end user.

7. Finally, the inadequacies noted in the product warning label are evidence of non-compliance by Sylvania with industry safe warning practices for dangerous materials, which are manufactured and distributed in the marketplace.

Further deponent sayeth not.

/s/ Burton Z. Davidson
Burton Z. Davidson

Subscribed and sworn to before me this
30 day of November, 1994.

/s/ David J. Burman
Notary Public

Middlesex County, State of New Jersey
My Commission Expires: _____

David J. Burman
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires Mar. 9, 1999

BEST AVAILABLE COPY

9-81

letalarc
amp

WARNING

R

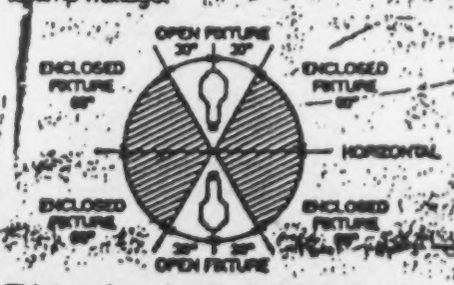
Use this lamp only in fixtures and circuits wired with compatible auxiliary equipment. Operation with incompatible equipment can cause lamp to shatter and may result in personal injury and damage to equipment and property. Lamp arc tube operates under pressure and at high temperatures and may shatter during operation. For continuous duty application it is recommended that all metalarc lamps be group relamped on or about rated lamp life and be cycled (turned off) at least once per week to reduce the risk of non-passive failure. IMPORTANT: See diagram below for enclosed fixture restrictions. Do not remove or insert lamp when power is on. If outer bulb is broken, shut off power before removing lamp to prevent electrical shock hazard. Do not scratch glass or subject lamp to undue pressure. Protect operating lamp from moisture sources which can cause lamp breakage. Follow operating instructions.

This lamp can cause serious skin burn and eye inflammation from short wave ultraviolet radiation if the outer envelope of the lamp is broken or punctured. Do not use where people will remain for more than a few minutes unless adequate shielding or other safety precautions are used. Certain types of lamps that will automatically extinguish when the outer envelope is broken or punctured are commercially available. This product conforms to all applicable standards contained in 21 CFR subchapter J.

This date of manufacture of this lamp is shown in coded information S R XXX visible on either the metal tab within the lamp near the base or embossed on the base. The XXX represents a 3 digit, 10 year (120 month) date code starting with January 1981 as 001, and ending with December 1990, as 120. For example, date code 007 designates a lamp manufactured in July 1981.

OPERATING INSTRUCTIONS

This is a metal halide electric discharge lamp that will operate satisfactorily only if auxiliary equipment used conforms to electrical specifications established by the lamp manufacturer. This lamp will not operate on most auxiliary equipment used for mercury lamps of the same wattage. Electrically insulate any metal support in contact with outer bulb to avoid glass decomposition. This lamp may be operated in any burning position. For enclosed fixture restrictions, see diagram below. Lamp should be screwed into socket firmly without using undue pressure. For total load, add auxiliary wattage to lamp wattage.



This lamp is equipped with a date-recording base; therefore, there is no guesswork about the burning life of Sylvania high intensity discharge lamps. Simply scratch through appropriate code numbers, the month and year the lamp is installed.

GTE Products Corporation
Manchester, NH

OS 010848

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHIGAN MUTUAL INSURANCE COMPANY, a Michigan corporation, as subrogee of Center Manufacturing, Inc.,

Plaintiff,

v.

OSRAM SYLVANIA, INC., a New York corporation, formerly known as GTE PRODUCTS CORPORATION, a New York corporation, and LITHONIA LIGHTING PRODUCTS, a Georgia corporation, jointly and severally,

Defendants.
_____/

No. 1:93-cv-541

(Filed April 1, 1995)

OPINION AND ORDER ON DEFENDANT OSRAM SYLVANIA, INC.'S MOTION FOR SUMMARY JUDGMENT

This a diversity action arising out of a fire which occurred at the Center Manufacturing, Inc. ("Center") plant in Byron Center, Michigan. The fire was allegedly caused by the failure of a metal halide lamp designed and manufactured by defendant Osram Sylvania, Inc. or its predecessor (both "Sylvania" herein). Plaintiff Michigan Mutual Insurance Company ("Michigan Mutual"), which insured Center's loss, has stepped in as subrogee of Center, asserting claims of "Breach of Express and Implied

Warranties in Tort and/or Contract" (Count I) and "Negligence" (Count II).[1]

Sylvania has moved for summary judgment, arguing, *inter alia*, that Michigan Mutual's claims sounding in tort are barred by the economic loss doctrine and that its claims for breach of warranty under the Uniform Commercial Code are time-barred. For the reasons to follow, the court hereby **GRANTS** Sylvania's motion and **DISMISSES** the action with prejudice.

DISCUSSION

Although some of the material facts are disputed, for purposes of this motion the court presumes Michigan Mutual's version to be true. On July 9, 1991, a 400 watt metal halide lamp manufactured by Sylvania exploded, causing a fire at Center's facility in Byron Center, Michigan. The explosion of the lamp showered white hot quartz particles onto a stack of cardboard cartons, setting them on fire. Michigan Mutual paid Center $2,435,933.45 in insurance benefits for loss and damage to Center's building and contents, in addition to loss of earnings and other expenses incurred by Center as a result of the fire. The Sylvania lamp in question was manufactured in January, 1984 and was likely installed at Center's facility

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[1] Michigan Mutual's complaint also named as a defendant Lithonia Lighting Products ("Lithonia"), the alleged manufacturer of the lamp fixture. However, mediation has been accepted as to Lithonia.

between mid-1984 and early 1985. Center did not purchase the lamp directly from Sylvania but from another vendor, whose identity is disputed.

In its brief in response to Sylvania's motion, Michigan Mutual expressly concedes that both its express and implied warranty theories under the UCC are barred by the applicable four-year statute of limitations contained in M.C.L. § 440.2725. Accordingly, the court will dismiss these claims with prejudice. Therefore, all that remains are Michigan Mutual's products liability tort claims.

The court concludes that Michigan Mutual's tort claims are barred by the economic loss doctrine, adopted by the Michigan Supreme Court in *Neibarger v. Universal Cooperatives, Inc.*, 439 Mich. 512, 486 N.W.2d 612, 618 (1992). Under this doctrine,

> [W]here a plaintiff seeks to recover for economic loss caused by a defective product purchased for commercial purposes, the exclusive remedy is provided by the UCC, including its statute of limitations. . . .
>
> . . . [T]he UCC provides remedies sufficient to compensate the buyer of a defective product for direct, incidental, and consequential losses, including property damage. . . . Where damage to other property was caused by the failure of a product purchased for commercial purposes to perform as expected, and this damage was within the contemplation of the parties to the agreement, the occurrence of such damage could have been the subject of negotiations between the parties.

486 N.W.2d at 618-20. More recently, in *Detroit Edison Co. v. NABCO, Inc.*, 35 F.3d 236 (6th Cir. 1994), a case virtually on all fours with the present case, a Sixth Circuit panel applying Michigan law held that the economic loss doctrine barred the plaintiff's tort claims against the supplier of a section of hot reheat pipe which exploded and caused severe damage to the plaintiff's power generation facility.

Michigan Mutual argues that the economic loss doctrine does not apply to is claims against Sylvania because (1) Center was not in privity with Sylvania, (2) Center was a "consumer" which did not negotiate the terms of the lamp's sale or the specifications for its manufacture; and (3) at the time it purchased the lamp, Center could not have reasonably contemplated the possibility that the product could cause a catastrophic fire. The court finds each of these attempts to avoid the application of the economic loss doctrine to be without merit.

In *Neibarger*, the defendant in one of the two consolidated cases addressed in that decision was not in privity with the plaintiff.[2] Nonetheless, the court applied the economic loss doctrine to dismiss the plaintiff's claims.

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[2] *See Neibarger*, 486 N.W.2d at 613 ("Plaintiffs . . . contracted with defendant Charles Brinker to install a milking system. According to plaintiffs, the milking system was designed by defendants Universal Cooperatives, Inc., and Brinker, and was installed by Brinker to begin milking operations on September 1, 1979").

Michigan Mutual's "consumer" argument is similarly meritless. Center's losses were commercial.[3] Moreover, although Michigan Mutual professes that Center could not negotiate the terms of sale for a product "mass produced by the tens of thousands," *see* Plaintiff's Brief in Opposition to Defendant Lithonia Lighting Products, Motion for Summary Judgment at 12,[4] Michigan Mutual's concession that Center has dealt with "numerous vendors" of electrical supplies over the years[5] underscores its ability to have shopped around and negotiated the terms of purchase for the product. The court further notes that *Southgate Community School Dist. v. West Side Construction Co.*, 399 Mich. 72, 247 N.W.2d 884 (1976), on which Michigan Mutual relies heavily in support of this argument, is cited with apparent disapproval and expressly modified in *Neibarger*, 486 N.W.2d at 616 n.19.

---

[3] Michigan Mutual argues that Center's constitutional right to equal protection under both the United States and Michigan constitutions will be violated if the court fails to deem Center to be a "consumer" simply because it is a commercial enterprise. This argument has no place in a diversity action between two private parties. This argument also ignores the fact that it is the nature of Center's use of the lamp (in a commercial setting), and not merely Center's corporate status, which results in the application of the economic loss doctrine. In sum, the court rejects the argument as wholly meritless.

[4] Although the claims against Lithonia are not at issue here, Michigan Mutual's brief in response to the present motion incorporates arguments made in response to a similar motion by Lithonia, and the court has therefore considered those arguments.

[5] *See* Affidavit of William C. Terry at ¶ 5 (attached as Exhibit 7 to Plaintiff's Brief in Opposition to Defendant Osram Sylvania, Inc.'s Motion for Summary Judgment).

Finally, Michigan Mutual's argument that this case is exempted from application of the economic loss doctrine based upon Center's purported inability to foresee the risk of fire posed by the Sylvania lamp is also without merit. Although the initial warning issued by Sylvania to accompany its product did not specifically mention the possibility of fire, it did warn that

> . . . Operation with incompatible equipment can cause lamp to shatter and may result in personal injury and damage to equipment and property. Lamp arc tube operates under pressure and at high temperatures and may shatter during operation.

Exhibit 3, Brief of Defendant Osram Sylvania, Inc. in Support of Motion for Summary Judgment.[6] As in *Detroit Edison*, it is foreseeable that a product which operates under high temperatures and under pressure could explode upon failure. 35 F.3d at 242. Fires caused by electrical products are simply not beyond the contemplation of commercial entities. This hazard was foreseeable, and Center "should have internalized some of the cost of the risks attendant to doing business." *Id.*[7]

---

[6] Sylvania issued far more specific revised warnings after 1985, which expressly warn of the risk of fire. Michigan Mutual appears to concede that these warnings were adequate as a matter of law, although it has challenged the adequacy of the pre-1985 warnings. Given the court's present disposition, it need not address the issue of the adequacy of the pre-1985 warnings except to say that they warn of the risk of property damage.

[7] Center apparently did internalize some of the costs of this risk by purchasing insurance from Michigan Mutual.

Because Michigan Mutual concedes that its UCC claims are time-barred, and because the court concludes that the economic loss doctrine bars its tort claims against Sylvania, the court finds it unnecessary to address the remaining issues raised by Sylvania's motion.[8]

ORDER

The court hereby **GRANTS** Sylvania's motion and dismisses Michigan Mutual's claims against Sylvania in their entirety.

So ordered this 4th day of April, 1995.

/s/ Wendell A. Miles
Wendell A. Miles,
Senior Judge

MAILING RECIPIENT LIST FOR 1:93-cv-00541 (sds)

April 04, 1995

Charles R. Tuffley, Esq.
Morrison, Mahoney & Miller
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[8] Sylvania has also argued that (1) it effectively limited its liability for damages, (2) Sylvania's revised warnings were sufficient to relieve it of any liability for failure to warn; (3) Michigan Mutual's experts have not identified a design defect; (4) Michigan Mutual has abandoned its claim of a manufacturing defect; and (5) Michigan Mutual cannot establish that Sylvania's lamp was the cause of the fire.

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Rule 56. Summary Judgment

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Supreme Court, U.S.
FILED
OCT 23 1997
CLERK

No. 97-339

In The
Supreme Court of the United States
October Term, 1997

MICHIGAN MUTUAL INSURANCE COMPANY,
a Michigan corporation, as subrogee of
Center Manufacturing, Inc.,
Petitioner,

v.

OSRAM SYLVANIA, INC., a Delaware corporation,
formally known as GTE PRODUCTS CORPORATION,
a Delaware Corporation,
Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the District Court properly applied the standards for summary judgment under Fed. R. Civ. P. 56 when it granted respondent Osram Sylvania's motion for summary judgment, concluding that there were no genuine issues of material fact and that the economic loss doctrine under Michigan law applied to bar tort claims.

STATEMENT UNDER RULE 29.6

The respondent is Osram Sylvania, Inc., which is a wholly-owned subsidiary of Siemens Corporation. Siemens Corporation is a wholly-owned subsidiary of Siemens AG. Siemens AG has issued shares to the public. The following are subsidiaries of Siemens AG that have issued shares to the public: Duewag, AG, Krefeld, Germany; Siemens Madrid, Spain; Siemens Pakistan; Siemens India; and Teleco CAVI, SpA, Roseto Degli Abruzzi, Italy.

While Osram Sylvania, Inc. is the only defendant in this action, GTE Products Corporation is the corporate entity which manufactured the metal halide lamp that petitioner claims caused the fire at issue in this case, and which was still in existence at the time the fire occurred. GTE Products Corporation was sold to Osram Acquisition Corporation on January 29, 1993. Osram Acquisition Corporation was merged into GTE Products Corporation, and that entity was subsequently renamed Osram Sylvania, Inc. GTE Products Corporation's former parent company retains some financial interest in the outcome of this case. Accordingly, Osram Sylvania, Inc. discloses the following information concerning GTE Products Corporation:

GTE Products Corporation is a former wholly-owned subsidiary of GTE Products of Connecticut Corporation. GTE Products of Connecticut Corporation is a wholly-owned subsidiary of GTE Corporation. GTE Corporation has issued shares to the public. The following are subsidiaries of GTE Corporation that may have issued shares to the public:

a. GTE California Incorporated
b. The Micronesian Telecommunications Corporation
c. VenWorld Telecom, C.A.
d. Anglo-Canadian Telephone Company
e. BC TELECOM Inc.
f. Pachena Industries Ltd.
g. Pacific Place Communications Ltd.
h. ISM Information Systems Management (B.C.) Corporation
i. Quebec-Telephone
j. GTE Directories (B) SDN.BHD
k. Jacksonville Cellular Telephone Corp.
l. Jacksonville Cellular Communications, Inc.
m. Wilmington Cellular Telephone Corp.
n. Wilmington Cellular Communication, Inc.
o. Burlington Cellular, Inc.
p. AG Communication Systems Corporation
q. Compañia Anónima Nacional Teléfonos de Venezuela (CANTV)
r. 2770695 Canada Inc.
s. Prism Systems Inc.
t. Chesapeake Directory Sales Company
u. GTE Directories Lanka (PVT) LTD.
v. Radiowealth, Inc.
w. Contel of California, Inc.
x. Contel Cellular Inc.
y. Florence Cellular Telephone Company, Inc.
z. DELCOM, INC.
aa. Sovinet
ab. EDN (d.b.a. Sovintel)
ac. MTX Italia

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Respondent, Osram Sylvania, Inc. ("Respondent" or "Sylvania") submits this brief in opposition to the Petition for Writ of Certiorari ("petition") which seeks the review of a decision of the United States Court of Appeals for the Sixth Circuit. (Petition App. 1-10).

STATEMENT OF THE CASE

A. Procedural History

This case arises out of a fire at Center Manufacturing, Inc.'s ("Center") automobile component facility on July 9, 1991. The fire was caused by the failure of a metal halide lamp manufactured by a predecessor of Sylvania. Petitioner Michigan Mutual Insurance Company ("Petitioner" or "Michigan Mutual") insured the Center facility and paid Center in excess of $2.4 million for loss and damage to the facility, loss of earnings and business interruption. (Petition App. 41) As subrogee of Center, Michigan Mutual brought this products liability action against Sylvania, asserting both tort and Uniform Commercial Code ("UCC") claims and alleging that Sylvania is liable for Michigan Mutual's payments to Center arising out of the fire. (Petition App. 42).

The District Court granted Sylvania's Motion for Summary Judgment, dismissing Michigan Mutual's claims on April 4, 1995. The court found that Michigan Mutual's UCC claims were time barred and that the economic loss doctrine, as articulated by the Michigan Supreme Court in *Neibarger v. Universal Cooperatives, Inc.*, 486 N.W.2d 612 (1992), and the Sixth Circuit Court of Appeals in *Detroit Edison Co. v. NABCO, Inc.*, 35 F.3d 236 (6th Cir. 1994), further barred its tort claims. (Petition App. 42-43). The Court of Appeals for the Sixth Circuit affirmed the Order of the District Court,

finding that the District Court properly applied the economic loss doctrine to the facts of this case. (Petition App. 2). Petitioner's petition for Rehearing En Banc was denied. (Petition App. 11).

B. Relevant Facts

Respondent Sylvania manufactures residential, commercial and industrial lighting products, including the 400 watt Universal Metalarc ("M400 U") metal halide high intensity discharge lamp at issue here. The metal halide lamp was produced solely for commercial and industrial uses. Sylvania marketed and sold its lighting products to and through electrical suppliers and distributorships but not directly to end-users. (Petition App. 27). The lamp at issue was manufactured by a predecessor company, GTE Products Corporation, in January 1984 and was accompanied by a lamp sleeve containing operating instructions and warnings as to risks involved in its use, specifically:

> Lamp arc tube operates under pressure and at high temperatures and may shatter during operations. For continuous duty application it is recommended that <u>all</u> metalarc lamps be group revamped on or about rated life and be cycled (turned off) at least once per week to <u>reduce the risk of non-passive failure</u> . . .

(emphasis added)(Petition App. 39-Metalarc Lamp Warnings, hereinafter, "pre-1985 warnings"). The lamps were purchased for commercial use throughout the Center facility and were installed without the benefit of encasing, glass or otherwise. (Petition at 3).

Sylvania established a Metalarc Containment Team ("Metalarc Team") in 1985, due to increasing awareness that metal halide lamps were allowed to burn continuously beyond their rated life and were not always operated in suitably enclosed fixtures. (Petition App. 26, ¶3). The Metalarc Team developed new technology capable of containing non-passive failures and revised the warnings and operating instructions for the Metalarc products. (hereinafter referred to as the "1985 warnings").[1] Because respondent did not sell directly to end-users, the revised warnings and instructions were initially circulated to fixture manufacturers and distributorships and ultimately, through a coordination of efforts between respondent and the fixture manufacturers and distributorships, to end-users. (Petition App. 29).[2]

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[1] The revised warnings and instructions for the metal halide lamps generally informed users that the lamps should be operated in suitably enclosed fixtures and should not be allowed to burn past their rated life. However, if lamps are not operated in enclosed fixtures and allowed to burn past their rated life, the possibility exits that the lamps may fail, whereby "the arc tube, operating at a pressure of approximately 50 psi, bursts and shatters the outer lamp jacket or outer glass encasement. When such a non-passive lamp failure occurred, the hot quartz particles (as high as 1832° F, 1000°C) and the outer jacket glass particles could be discharged against the fixture's enclosure or into the environment if the fixture was open." (Petition App. 26, ¶3).

[2] While Petitioner maintains that Center "did its best" in response to the revised warnings issued in 1985 by no longer purchasing metal halide bulbs manufactured by Respondent and removing the 100 or so lamps in Center's facility, nearly 5 years after receiving the 1985 revised warnings, Center had not removed all of the halide lamps manufactured by Osram. (Petition at 5, n. 1).

Petitioner commenced this action in July 1993, in the United States District Court for the Western District of Michigan, based on diversity of citizenship, seeking damages which resulted from a July 9, 1991 fire at Center's automobile component facility. The fire was allegedly caused by the shattering of one of Center's M400 U Metalarc lamps manufactured in 1984. Petitioner claimed that hot quartz particles that landed on a pallet of cardboard boxes ignited the fire which resulted in extensive damage to Center's facility. (Petition at 4). Petitioner brought this action seeking to recover the $2.4 million it paid Center.

The District Court granted Sylvania's motion for summary judgment and dismissed Michigan Mutual's claim. Since Michigan Mutual conceded that its warranty claims, which were governed by the UCC, were barred by the four year statute of limitations, only the negligence claims were before the court. (Petition App. 42). The Court agreed with Sylvania that the economic loss doctrine as articulated by the Michigan Supreme Court in *Neibarger, supra,* limited Michigan Mutual's remedies for the tort claims to those under the UCC, which in this case, were unavailable because of the statute of limitations. The *Neibarger* court held, "where a plaintiff seeks to recover for economic loss caused by a defective product purchased for commercial purposes, the exclusive remedy is provided by the UCC, including its statute of limitations." 486 N.W.2d at 618.

The District Court reviewed this case in light of the two-step test enunciated in *Neibarger* for application of the economic loss doctrine to property besides the defective product, namely that the damage was within the contemplation of the parties at the time of purchase and that there was an opportunity to negotiate the terms of the purchase, and concluded that each step was satisfied. The Court found that because Center contracted with numerous electrical supply

vendors, it could reasonably have negotiated the terms of its purchase, notwithstanding the absence of direct contact with the manufacturer, and further that fires caused by electrical products were not beyond the contemplation of commercial entities. (Petition App. 43-45).

The Sixth Circuit affirmed. The court likened the facts of this case to those of *Detroit Edison, supra*,[3] noting "[w]here the product is purchased for use in a commercial setting and both parties are business entities, it is more likely that the consequences of the product's failure are within the

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[3] There is no limitation in the economic loss doctrine as articulated in either *Neibarger, supra*, or *Detroit Edison, supra*, that the opportunity to negotiate necessarily must precede the sale (albeit both the District Court and the Court of Appeals properly found that there was such a pre-sale opportunity to negotiate here), so long as "the occurrence of such damage could have been the subject of negotiations between the parties." *Neibarger, supra*, 439 N.W.2d at 620. *See also, Detroit Edison, supra*, 35 F.3d at 241. As noted, Center had 5 years to initiate negotiations after the 1985 warnings and before the fire occurred. Moreover, Petitioner's argument that it had no one to negotiate with is carefully limited to the period "prior to [Center's] purchase of Respondent's lamp"(Petition at 17), since it concedes, as it must, that it was contacted by Respondent by 1986 and was provided additional warnings and information. *See,* Petition at 5, n.1, and App. 26-34. At that juncture and for at lease two (2) years thereafter, Center had, but ignored, the full panoply of UCC remedies available to it, rendering Petitioner's arguments of injustice in the application of the economic loss doctrine bereft of any solid footing.

contemplation of the parties." *Id.*[4] Michigan Mutual's petition for rehearing en banc was denied.

ARGUMENT

A. Summary of Reasons for Denying the Writ

The Sixth Circuit's affirmance of the District Court's grant of summary judgment was based on an entirely routine and correct application of the law regarding Fed. R. Civ. P. 56, as articulated by this Court in its 1986 trilogy decisions in , *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 586 (1986). This Court has already spoken extensively on the Rule 56 issue raised by Michigan Mutual in its petition, and further, the holdings of the 1986 trilogy have consistently been applied throughout the circuits. Given that the Sixth Circuit's decision was in complete harmony with precedents from this Court and those of other circuits, and the absence of conflict within the Sixth Circuit, Michigan Mutual's claimed error by the Sixth Circuit is not an appropriate basis for review by this Court.

The Sixth Circuit properly determined that the economic loss doctrine applied to bar recovery of Michigan Mutual's tort claims and limited Center's recovery to remedies under the UCC. Because the facts of this case fit squarely

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[4] *Detroit Edison Co, supra*, involved a claim by Detroit Edison against a pipe manufacturer after a section of the pipe, which carried steam at both high temperature and pressure, burst causing extensive damage to Edison's facility. The court, noting the sophistication of the parties and the use of the product, limited Edison's recovery to those available under the economic loss doctrine.

within the Michigan economic loss doctrine, Michigan Mutual's attempt to argue that the Sixth Circuit improperly drew inferences in favor of Sylvania is misplaced.

Michigan Mutual has failed to meet its burden of demonstrating "compelling reasons" for this Court to review the decision of the Sixth Circuit. Sup. Ct. R. 10. Michigan Mutual has not established that the Sixth Circuit's holding has broader implications, but in fact misconstrues that court's holding. Michigan Mutual has further failed to demonstrate any true conflict between the Sixth Circuit's decision and precedent from other circuits (which it does not attempt) or from this Court, nor has Michigan Mutual established that there is an important federal question here which should be settled by this Court.

In sum, Michigan Mutual has not shown that the Sixth Circuit's decision involves recurring issues of importance, conflicts with precedent from this Court or from other courts of appeal, or implicates the Court's power to settle important federal questions. Accordingly, Michigan Mutual's Petition for a Writ of Certiorari should be denied.

B. No Conflict Exists Between the Sixth Circuit's Decision and Precedent From this Court and Other Courts of Appeal

1. The Sixth Circuit Properly Applied Michigan's Economic Loss Doctrine in Holding that Michigan Mutual's Tort Claims were Barred

The Sixth Circuit had valid grounds for adopting the self-evident proposition that Center was a commercial customer buying products in a commercial transaction, which mandated

application of the economic loss doctrine. According to Michigan Mutual, the Sixth Circuit contravened long standing precedent of this Court by drawing inferences from the facts in favor of Sylvania, the moving party. Petitioner maintains that Center acted as a consumer when it purchased these halide industrial lamps for its manufacturing facility. Michigan Mutual's strained argument, however, is fatally flawed and was properly rejected by the Sixth Circuit. While Fed. R. Civ. P. 56 requires courts to resolve inferences from the facts in favor of the non-moving party, this Court has specifically restricted the resolution of such inferences in favor of the non-moving party, to those which are reasonable and "justifiable." *Anderson, supra,* 477 U.S. at 255.

Petitioner provides no basis to support its contention that because Center acted as a consumer, the economic loss doctrine does not bar its tort claims. The economic loss doctrine in Michigan "hinges on a distinction drawn between transactions involving the sale of goods for commercial purposes where economic expectations are protected by commercial and contract law, and those involving the sale of defective products to individual consumers who are injured in a manner which has traditionally been remedied by resort to the law of torts." *Neibarger, supra,* 486 N.W.2d at 615. Application of the economic loss doctrine requires commercial enterprises to look exclusively to the UCC to recover for direct and consequential damage to other commercial property. Obviously, Center was not an "individual consumer," nor was this a sale for anything other than "commercial purposes."[5]

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[5] Indeed, Michigan law unequivocally treats this transaction as commercial rather than one involving "consumer goods" which are defined in the Michigan UCC as those "used or bought for use primarily for personal, family or household

(continued...)

Michigan Mutual maintains that there is a genuine issue of fact as to whether the necessary elements for application of the economic loss doctrine exists in this case. In *Detroit Edison*, the Sixth Circuit restated the rule from *Neibarger* regarding application of the economic loss doctrine to property other than the product, noting specifically that the focus is "on the parties involved and the nature of the product's use." 35 F.3d at 242. Here, Center was a commercial entity using metal halide lamps in a commercial setting, and it sustained economic losses to its business (damage to its facility and contents, and loss of earnings and expenses) as a result of the fire caused by the failure of the lamp. As a commercial user of industrial lamps, suffering economic losses as a result of failure of the lamp, the application of the economic loss doctrine to Michigan Mutual's tort claims was proper and consistent with holdings of the Supreme Court of Michigan and the federal decisions interpreting Michigan law. Petitioner's suggestion that Center is more like a consumer because "Center was no expert on metal halide lamps" (Petition at 15) has no relevant bearing on this case because Center's status as a commercial entity is not affected by its expertise in the use of a product sold in a commercial transaction. Thus, the inferences of fact which petitioner claims were improperly drawn in Sylvania's favor, were not dispositive elements in the application of the economic loss doctrine.

For example, in *Bailey Farms, Inc. v. Nor-Am Chemical Co.*, 27 F.3d 188, 192 (6th Cir. 1994), the Sixth Circuit applied Michigan's economic loss doctrine and held that the

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[5](...continued)
purposes." M.C.L.A. §440.9109. Clearly, Petitioner's efforts to construe Center as a consumer fall far short of the tests for consumers defined in the Michigan UCC and articulated in *Neibarger*.

destruction of a watermelon crop by weed fumigant which resulted in lost profits was a "commercial loss." This was found to be a commercial transaction notwithstanding the fact that the farmer had never before used the soil fumigant product at issue. Likewise in *Snyder v. Boston Whaler, Inc,* 892 F. Supp. 955 (W.D. Mich. 1994), where the plaintiff purchased a charter fishing boat for business and personal use which sank, the District Court held that the plaintiff's tort claims were barred because "economic interests were central" to the transaction and the case involved purely economic loss. Additionally, in *Theuerkauf v. United Vaccines*, 821 F. Supp. 1238, 123 (W.D. Mich. 1993), the court applied the economic loss doctrine to the plaintiff, a mink rancher, where the plaintiff purchased a vaccine for use on his stock which resulted in the death of plaintiff's mink stock. In *Theuerkauf*, there was no suggestion that the rancher had expertise in use of the vaccine or in veterinary medicine. *See also, Hartford Fire Ins. Co. v. Hüls America, Inc.*, 893 F. Supp. 465, *reconsideration denied*, 921 F. Supp. 278 (E.D. Pa. 1995), where the court applied the economic loss doctrine to a nursing home (hardly an "expert" in roofs) which sued the architects and the roofing manufacturer after the roof collapsed. The court held that the economic loss doctrine precluded recovery in tort for damages, when the loss was purely economic.

Petitioner's insistence on defining Center as a "consumer" in an attempt to create a genuine triable issue is specious and has previously been rebuffed by this Court. In *Anderson, supra*, this Court stated, "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." 477 U.S. at 247 (emphasis added) . Because the Sixth Circuit's affirmance of the District Court's grant of summary judgment was proper and a routine application of Michigan's

economic loss doctrine, that decision is therefore not appropriate for review by this Court.

2. The Sixth Circuit's Straightforward Application of the Economic Loss Doctrine Mandated Summary Judgment

Michigan Mutual misconstrues the standard for application of the economic loss doctrine and maintains that application of the doctrine to other property requires that (1) the parties were required, at the time of purchase, to contemplate the fire and resulting damage from the failure of the lamp and (2) Center should have had an opportunity to negotiate with Sylvania or its predecessor, GTE, at the time of the lamp's purchase, in order to allocate the risk of such fire. (Petition at 15). Michigan Mutual completely misses the point. The Sixth Circuit's restatement in *Detroit Edison, supra,* of the *Neibarger* rule, noted specifically that the focus for application of the economic loss doctrine is "on the parties involved and the nature of the product's use." 35 F.3d at 242.

The Sixth Circuit quite properly rejected Petitioner's attempt to create an issue of fact through its use of an affidavit from its expert, Dr. Burton Z. Davidson, which "nit picked" the pre-1985 warnings as inadequate, without establishing that anyone from Center ever reviewed or relied on the information contained therein. Instead, the court arrived at common sense conclusion that "while the lamp was not integral to Central's manufacturing process . . . the inherent fire hazard associated with a 400-watt halide lamp is no less within the contemplation of the parties than is the inherent danger posed by a section of reheat pipe [the product which failed in *Detroit Edison*]." (Petition App. 5). As such, these findings are wholly consistent with the teachings of this Court that "[i]f the evidence is merely

colorable, . . . or is not sufficiently probative, . . . summary judgment may be granted." *Anderson, supra,* 477 U.S. at 249-250 (citations omitted).

Further, the absence of an opportunity to negotiate the allocation of the risk does not bar application of the economic loss doctrine. Although the *Neibarger* court did not articulate this as a basis for application of the rule, even if it had, no requirement exists that there be actual negotiations. Actual negotiation presupposes privity between the parties, which is not necessary in Michigan for the application of the economic loss doctrine. *See, Neibarger*, 486 N.W.2d at 614. (Petition App. 5). Since "Petitioner is not alleging that the Court of Appeals misapplied or misinterpreted the economic loss doctrine" (Petition at 10, n. 3), its attempt to argue that a different framework for application of doctrine should have been used is ill-conceived as a basis for this Court's review.

3. The Sixth Circuit's Holding is Consistent with Precedent From This Court

Michigan Mutual also attempts to create a conflict by suggesting that the Sixth Circuit ignored summary judgment precedent. (Petition at 18). Yet the Sixth Circuit's decision was nothing more than a proper application of long-standing, established summary judgment standards. As such, it is not an appropriate decision for review.

The Sixth Circuit correctly followed the decisions from this Court holding summary judgment appropriate when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. *Celotex, supra,* 477 U.S. 317; *see also Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989). Moreover, the Sixth Circuit

expressly followed the summary judgment precedent of this Court requiring the evidence of the non-movant to be believed, and all justifiable inferences drawn in its favor. *See*, *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992); *Anderson, supra*, 477 U.S. 242; *Matsushita, supra*, 475 U.S. 574, 588; *Adickes v. S.H. Kress & Co.*,398 U.S. 144 (1970);*U.S. v. Diebold, Inc.*, 369 U.S. 654 (1962). However, notwithstanding that the non-movant is to be believed and inferences resolved in its favor, Fed. R. Civ. P 56 authorizes motions for summary judgment upon proper showing of the lack of a genuine triable issue. *Anderson, supra,* at 248; *Matsushita, supra*, at 587; *Celotex, supra,* at 329. "The mere existence of a scintilla of evidence in support of the non-movant's position will be insufficient; there must be evidence on which the jury could reasonably find for the non-movant." *Anderson, supra, 477* U. S. at 252. Further, "where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial'." *Matsushita, supra,* 475 U.S. at 587.

In *Anderson, supra,* this Court noted that "the trial judge's summary judgment inquiry as to whether a genuine issue exists will be whether the evidence presented is such that a jury applying that evidentiary standard could reasonably find for either the plaintiff or the defendant." 477 U.S. at 255. Application of the evidentiary standards of the economic loss doctrine bar petitioner's tort claims; and a review of the parties, the loss suffered, and the purpose of the goods, fit squarely within the factors which trigger the application of the economic loss doctrine. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson, supra,* at 248; *See also, Celotex, supra,* 477 U.S. at 322; *Matsushita, supra,* 475 U.S. at 587. Thus, in light of this

Court's holdings in *Anderson*, *Celotex*, and *Matsushita*, the Sixth Circuit properly found that petitioner's argument regarding Center's status as a consumer as opposed to commercial purchaser, was not a genuine issue of material fact sufficient to defeat a properly supported motion for summary judgment.

Based on the straightforward application of the substantive law to the facts herein, the Sixth Circuit properly concluded that because "only one reasonable conclusion [could] be drawn, the factual dispute does not involve a genuine issue requiring trial." *Cook v. Providence Hospital*, 820 F.2d 176, 179 (6th Cir. 1987). Therefore, the Sixth Circuit's decision was merely an application of recognized and settled law of summary judgment precedent. Because this Court generally will not review the application of a properly stated rule of law, the Sixth Circuit's holding on the law of summary judgment cannot serve as a basis for granting certiorari. Sup. Ct. R.10.

C. There is No Important Question of Federal Law Presented Here that Should be Settled by this Court

The Rules of this Court state that a petition for writ of certiorari "will be granted only for compelling reasons." Sup. Ct. R. 10. In general, this Court has instructed that a writ of certiorari will be denied if the case involves circumstances or issues which are not likely to be repeated, *see Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955) (noting that the Court reviews issues that are "beyond the academic or the episodic"); 13 James W. Moore, ed., *Moore's Federal Practice* ¶810.21 at SC 10-23 (2d ed. 1995) (stating that the Court will not be inclined to review "an issue that is unlikely to recur" or

"results from a unique factual situation"), or if "the asserted error consists of . . . the misapplication of a properly stated rule of law." Sup. Ct. R. 10. Moreover, certiorari will be granted "only 'in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority'" between the courts of appeals. *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502 (1951) (quoting *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923)). Finally, this Court has refrained from resolving conflicts that arise between panels within the same circuit, on the grounds that such conflicts should be resolved by the court of appeals internally. *See, e.g., Taylor v. U.S.*, 493 U.S. 906, 906 (1989); *Davis v. U.S.*, 417 U.S. 333, 340 (1974); *Wisniewski v. U.S.*, 353 U.S. 801, 902 (1957). As has been discussed, petitioner has failed to satisfy these criteria, and has not offered "compelling reasons" for granting a writ of criteria here.

In an attempt to provide an alternative ground for granting certiorari, Michigan Mutual argues that this Court should review the Sixth Circuit's decision so that it may provide guidance regarding the resolution of summary judgment motions in federal courts, specifically, the proper construction of inferences from facts on a motion for summary judgment. (Petition at 24). Michigan Mutual claims that the Sixth Circuit's decision sanctioned the District Court's erroneous grant of summary judgment where genuine issues of material fact remained. Michigan Mutual argues that the Sixth Circuit improperly construed inferences of fact in favor of Sylvania, the moving party, in contravention of this Court's summary judgment precedent. Michigan Mutual further maintains that this Court must revisit the standards articulated in 1986, to avert perceived looming anarchy and chaos by

District Courts and among the circuits respecting the proper resolution of motions for summary judgment. (*Id.*).

The case law, however, does not support Michigan Mutual's contentions. The overwhelming majority of circuits have adopted holdings in motions for summary judgment consistent with that of the Sixth Circuit, which is consistent with the precedents from this Court. In *H.L. Hayden Co. of New York, Inc. v. Siemens Medical Systems, Inc.*, 879 F.2d 1005, 1012 (2nd Cir. 1989), the Second Circuit held that "only reasonable inferences can be drawn from the evidence in favor of the nonmoving party."(emphasis in original). Also, in *Arnold Pontiac-GMC, Inc. v. Budd Baer, Inc.*, 826 F.2d 1335, 1339 (3rd Cir. 1987), which involved a motion for summary judgment where a claim of conspiracy was made, the Third Circuit held that *Matsushita* directs us "'to consider whether the inference of conspiracy is reasonable.'" Finally, in *Essex v. United Parcel Service, Inc.*, 111 F.3d 1304,1308 (7th Cir. 1997), the Seventh Circuit, affirming a grant of summary judgment by the District Court and citing both *Celotex* and *Anderson*, noted, "[t]o withstand summary judgment, the nonmovant must demonstrate that the record as a whole permits a rational fact-finder to rule in his favor." (citation omitted).

To defeat a properly supported motion for summary judgement, this Court expressly requires the existence of a genuine issue of material fact. *Anderson, supra*, 477 U.S. at 247; *Celotex, supra*, 477 U.S. at 329; *Matsushita, supra*, 475 U.S. at 587. Michigan Mutual reliance on *Diebold* and *Anderson* to support its contention that the Sixth Circuit drew improper inferences in favor of Sylvania, is misplaced. In both *Diebold* and *Anderson*, this Court sanctioned the drawing of reasonable and justifiable inferences in favor of the non-moving party. Petitioner, however, glosses over the Court's requirement that the inferences be reasonable and justified.

See, Eastman Kodak, supra, 504 U.S. at 468 n.14 (citing numerous decision of this Court and Courts of Appeals which reiterate the notion that only reasonable inferences can be drawn from the evidence in favor of the nonmoving party). Michigan Mutual would have this Court make the requested inferences that Center acted as a consumer when it purchased the Metalarc lamp and that it had no basis upon which to contemplate that a high wattage lamp, operated at high pressure and at high temperature, could cause a fire under any circumstances. Such inferences are not only unreasonable, but are also unjustified given the undisputed evidence. Therefore, the Sixth Circuit's decision to reject the notion that Center was anything other than a commercial entity and was not akin to an "individual consumer" was proper and consistent with both *Diebold* and *Anderson*, as well as with the long line of authorities addressing this issue.

As the Sixth Circuit's holding was consistent with precedent from this Court, there has been no confusion or inconsistency in the application of the inference rule in the resolution of respondent's motion for summary judgment. "[T]here is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party." *Anderson*, 477 U.S. at 249. (citations omitted). Evidence "not significantly probative" or which is "merely colorable" will not defeat a motion for summary judgment. *Id.* Since the Sixth Circuit tracked and upheld this standard in its affirmance of the summary judgment granted to Sylvania by the District Court, this decision is not appropriate for review by this Court and the petition for writ of certiorari should be denied.

CONCLUSION

For the forgoing reasons, the petition of the Michigan Mutual Insurance Company for a writ of certiorari should be denied.

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(3)

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No. 97-339

In The

Supreme Court of the United States

October Term, 1997

MICHIGAN MUTUAL INSURANCE COMPANY,
a Michigan corporation,
as subrogee of Center Manufacturing, Inc.,

Petitioner,

v.

OSRAM SYLVANIA, INC., a New York corporation,
formerly known as GTE PRODUCTS CORPORATION,
a New York Corporation,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

In its Petition for Writ of Certiorari, Petitioner, Michigan Mutual Insurance Company ("Petitioner"), established how the District Court committed a fundamental error in granting Respondent, Osram Sylvania, Inc. ("Respondent"), summary judgment. The District Court drew inferences from the facts in favor of Respondent, **the moving party**, even though 1) genuine issues of material fact remained which should have precluded summary judgment, and 2) **at the very least** there were equally reasonable (if not more so) inferences from the facts that could be drawn in Petitioner's favor, once again requiring that Respondent's motion be denied. The Court of Appeals then exacerbated this error by affirming the trial court (although at least one of the three Court of Appeals Judges recognized the critical mistake being made, and properly dissented).

Such action flies in the face of this Court's established precedent regarding the disposition of summary judgment motions. It also sends a dangerous message to federal trial and appellate courts around the country, encouraging them to sit both as judge and jury, thereby converting the Fed. R. Civ. P. 56 summary judgment mechanism into a substitute for a trial. In short, the obvious error that occurred here is of such magnitude that it justifies this Court's intervention.

In its response, Respondent attempts to complicate matters as much as possible, obviously hoping that by doing so this Court will simply throw its hands up in the air and choose not to get involved. In the process, it makes inconsistent and inaccurate arguments regarding

the law, along with numerous misrepresentations regarding Petitioner's arguments and the evidence presented to the trial court. So that this Court can see this case for what it is, and not for what Respondent would like it to be, Petitioner submits this Reply Brief.

ARGUMENT

THE PETITION SHOULD BE GRANTED, AS THE DISTRICT COURT AND COURT OF APPEALS BLATANTLY VIOLATED THIS COURT'S WELL-ESTABLISHED RULES GOVERNING THE RESOLUTION OF SUMMARY JUDGMENT MOTIONS

A. Michigan's Economic Loss Doctrine

In its Petition, Petitioner discussed Michigan's economic loss doctrine, and the "other property damage" exception to that doctrine. Analyzing the exception in light of the facts of this case, Petitioner's tort claims for damage to Center Manufacturing, Inc.'s ("Center") other property are barred by the economic loss doctrine **only** if two things are established. First, a fire causing extensive damage was within the contemplation of Center when the lamp in question was purchased. Second, when the lamp was purchased Center had an opportunity to negotiate with Respondent, allocating the risk of such a fire. (*See* Petition, pp. 12-15).[1]

[1] Because this case arises under Michigan law, this Court's prior decisions regarding the economic loss doctrine in other settings are not probative. However, it is interesting to note that pursuant to this Court's view of the doctrine in an admiralty law context, **all** other property damage claims are *per se* immune

While this two-part test is not the subject of Petitioner's Petition[2], Respondent spends a good deal of its Brief in Opposition questioning the validity of this test. However, this is done in a strangely inconsistent manner. First, in discussing what the District Court did, Respondent refers to this two-step test as if there is no question regarding its validity. (Brief in Opposition, pp. 4-5). Next, it begins to back off from the second step of the test, questioning whether the opportunity to negotiate had to exist at the time the product was purchased (suggesting, without any supporting authority, that a post-sale opportunity to negotiate is sufficient). (Brief in Opposition, p. 5, n. 3). Finally, Respondent totally rejects the second step of the test, asserting "the absence of an opportunity to negotiate the allocation of the risk does not bar the application of the economic loss doctrine." (Brief in Opposition, p. 12).

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from the economic loss doctrine. *See Saratoga Fishing Company v J.M. Martinac & Company*, ___ U.S. ___, 117 S.Ct. 1783, 138 L.Ed.2d 76 (1997). If that rule applied here, Petitioner's case could not have been dismissed.

[2] As discussed in the Petition (*see* page 10, n. 3), Petitioner is not contending the District Court and/or the Court of Appeals misinterpreted Michigan's economic loss doctrine, or the two-step other property damage exception test. Petitioner challenges their determination that based on the facts and evidence presented in connection with Respondent's Motion for Summary Judgment, Respondent satisfied each step of the test as a matter of law.

This does not implicate purely Michigan state law concerns regarding the contours of the economic loss doctrine. Rather, it implicates this Court's rules for how summary judgment motions are to be resolved, and how the evidence presented in connection with such motions is to be viewed, by federal courts.

In any event, Respondent's attacks on the aforementioned two-step other property damage exception test fail when Michigan case law (the source of the court-created economic loss doctrine) is consulted. This test was first articulated by the Michigan Supreme Court in *Neibarger v Universal Cooperatives, Inc.*, 439 Mich. 512, 486 N.W.2d 612, 620 (1992), as recognized in *Detroit Edison v NABCO, Inc.*, 35 F.3d 236 (6th Cir. 1994):

> The rule that emerges from *Neibarger* significantly narrows the "other property" exception while expanding the definition of economic loss. Under *Neibarger*, **tort claims for damage to other property are barred by the economic loss doctrine if those losses are direct and consequential losses that were within the contemplation of the parties and that, therefore, could have been the subject of negotiations between the parties.**

35 F.3d at 242 (emphasis added). Any doubt about the importance of the second element of this test – an opportunity to negotiate – disappeared in 1995 with the Michigan Court of Appeals' decision in *Huron Tool and Engineering Company v Precision Consulting Services, Inc.*, 209 Mich. App. 365, 532 N.W.2d 541 (1995):

> . . . **[T]he economic loss doctrine does not apply where there is no contractual relationship between the parties – that is, where the parties have never been in a position to negotiate** the economic risks themselves. –

532 N.W.2d at 545 (emphasis added). Consequently, given the deep roots the two-step test has in Michigan law, Respondent's baseless attacks against it should be rejected out of hand.

B. The District Court Granted, And The Court Of Appeals Affirmed, Summary Judgment For Respondent By Improperly Drawing Inferences From The Facts In Favor Of Respondent, The Moving Party

Petitioner has established that, **at the very least**, conflicting inferences arose from the undisputed facts regarding Center's contemplation of the risk and opportunity to negotiate when it purchased Respondent's lamps. (*See* Petition, pp. 18-22). This Court **requires** inferences from the facts be drawn in favor of the non-moving party. *Eastman Kodak Co. v Image Technical Services, Inc.*, 504 U.S. 451, 456, 112 S. Ct. 2072, 119 L.Ed.2d 265 (1992); *Anderson v Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L.Ed.2d (1986); *Matsushita Electric Industrial Co., Ltd. v Zenith Radio Corp.*, 475 U.S. 574, 587-588, 106 S. Ct. 1348, 89 L.Ed.2d 538 (1986); *Adickes v S.H. Kress & Co.*, 398 U.S. 144, 158-159, 90 S. Ct. 1598, 26 L.Ed.2d 142 (1970); *U.S. v Diebold, Inc.*, 369 U.S. 654, 655, 82 S. Ct. 993, 8 L.Ed.2d 176 (1962). By blatantly ignoring this Court's rules, and drawing inferences from the facts in favor of Respondent, **the moving party**, the District Court and Court of Appeals have committed the most fundamental of errors.

In its Brief in Opposition, Respondent makes several arguments in an attempt to convince this Court that there were no reasonable inferences from the facts that could be drawn in Petitioner's favor. Consequently, Respondent contends the District Court and Court of Appeals acted properly in drawing inferences in its favor. However, on closer examination none of Respondent's arguments have any merit.

First, Respondent argues there is no factual basis for Petitioner's claim that Center acted as a consumer when it purchased the lamps in question, and, as such, the economic loss doctrine should not apply to its tort claims. (Brief in Opposition, pp. 8, 13-14). Respondent is addressing the wrong argument. While this "consumer" argument was one of several arguments Petitioner made to the District Court and Court of Appeals, it **is not** an argument Petitioner makes to this Court.[3] Therefore, Respondent's argument is irrelevant.

Second, Respondent claims there is no evidentiary basis for the inference that Center had no reason to suspect, at the time of purchase, that Respondent's lamp might cause a fire. (Brief in Opposition, p. 17). It is astounding Respondent makes this argument, as it knows it is not true. In its Petition, Petitioner discusses at length a "Burning Positions" diagram that accompanied Respondent's lamps at the time they were purchased. (*See* Petition, pp. 4-5, 15-16, 19-20, and App. 39). **It specifically stated Respondent's lamp could be safely operated in a vertical position in an uncovered fixture!** Given such an assurance by Respondent, it is quite reasonable to infer that, at the time of purchase, Center could not foresee Respondent's lamp would explode and cause extensive damage to Center's property when operated in a vertical

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[3] This consumer argument goes to the scope of the economic loss doctrine, which is a question of Michigan state law. In its Petition, Petitioner addresses only questions of federal court procedure, *e.g.*, standards for granting summary judgment pursuant to Fed. R. Civ. P. 56.

position in an uncovered fixture (**the way Center used the lamp**).

It is interesting to note that nowhere in its Brief in Opposition does Respondent discuss, or even mention, this diagram. Nor does Respondent refute Petitioner's argument regarding the reasonable inference that arises from the diagram. Respondent obviously wishes the diagram did not exist.[4] However, it does exist, and from it a very plausible inference arises – a fire causing extensive damage was **not** within the contemplation of Center when the lamp was purchased. This inference, if accepted, would preclude summary judgment as the first step of the other property damage exception test would not be satisfied. Even if there was an equally plausible

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[4] Respondent also argues the District Court and Court of Appeals "properly rejected" Dr. Burton Davidson's (Petitioner's warnings expert) evaluation of Respondent's pre-1985 warnings (concluding they were grossly inadequate) in favor of "a common sense conclusion." (Brief in Opposition, p. 11). Rather than supporting Respondent's position, this argument actually makes Petitioner's point!

In the context of a motion for summary judgment, a court cannot simply reject an expert's findings without some basis. Respondent **never** provided any reason, other than its own unsubstantiated assertions there was no foundation for Dr. Davidson's opinions (easily refuted by the text of Dr. Davidson's Affidavit, *see* App. 35), why his opinions should not be considered. Consequently, what the District Court and Court of Appeals effectively did was to decide Dr. Davidson's opinions were not entitled to any weight. With all due respect to those courts, **they do not have that power**. *See Anderson*, 477 U.S. at 255. This is yet another example of how the lower courts in this case improperly placed themselves in the role of the jury.

competing inference in Respondent's favor, the District Court and Court of Appeals were not permitted to make a choice. For the purposes of Respondent's motion, these courts **had** to select the inference favorable to Petitioner. By doing otherwise, these courts reversibly erred.

Finally, while **admitting** Center had no opportunity to negotiate with it at the time the lamps were purchased, Respondent argues there might have been an opportunity to negotiate several years **after** the lamps were purchased. (Brief in Opposition, p. 5, n. 3). This argument fails for a number of reasons. First and foremost, **it is a new argument never before made by Respondent**. Respondent never argued to the District Court or Court of Appeals that there might have been a post-sale opportunity to negotiate, and neither of those courts found any such opportunity existed. Consequently, it is not an argument that should be considered by this Court.[5]

Moreover, even if this argument is considered, there is no legal basis for concluding that a post-sale opportunity to negotiate will satisfy the second part of the other property damage exception test. **No** Michigan state or federal case has ever held that it does, and Respondent cites **no** authority in support of its argument.

Indeed, it would make little sense to look at opportunities to negotiate after the defective product in question has been purchased, and the Uniform Commercial

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[5] Consideration of this argument for the first time on appeal, without Petitioner having previously had an opportunity to introduce evidence to the contrary when Respondent's Motion for Summary Judgment was briefed, would be unjust and unfair.

Code's statute of limitations has commenced to run. The economic loss doctrine is premised on the assumption that **when a product is purchased**, commercial parties can negotiate warranties, insurance requirements, etc. in order to allocate the risk of product malfunction.[6] If an opportunity to negotiate arises sometime after the sale, this critical window of opportunity is lost. The product is already in place, and any warranties, etc. to be had have already been issued.

Consequently, the **undisputed** fact remains that at the time Center purchased Respondent's lamp, it had no opportunity to negotiate with Respondent regarding the risk of the lamp causing a fire or other calamity. There really is only one plausible inference that arises from this – the opportunity to negotiate "the economic loss doctrine requires as its premise simply did not and could not exist." (App. 9 - Dissent from Court of Appeals Opinion).

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[6] For example, the Michigan Supreme Court observed in *Neibarger*:

> . . . [I]n a commercial transaction, the parties to a sale of goods have the opportunity to negotiate the terms and specifications, including warranties, disclaimers, and limitation of remedies. When a product proves to be faulty **after the parties have contracted for sale** and the only losses are economic, the policy considerations supporting products liability in tort fail to serve the purpose of encouraging the design and production of safer products . . . [T]he adoption of the economic loss doctrine will allow sellers to predict with greater certainty their potential liability for product failure and to incorporate those predictions **into the price or terms of the sale.**

486 N.W.2d at 616, 619 (emphasis added).

Even if a contrary inference could somehow be justified, the existence of a plausible inference favorable to Petitioner, the non-moving party, is enough to defeat Respondent's Motion for Summary Judgment (as the second part of the other property damage exception test has not been satisfied). The Court of Appeals reached the opposite conclusion, and its decision should be reversed.

CONCLUSION

For the foregoing reasons, along with those discussed in its Petition, Petitioner Michigan Mutual Insurance Company respectfully requests that its Petition for Writ of Certiorari be granted, and upon further briefing and oral argument, the April 17, 1997 Opinion of the United States Court of Appeals for the Sixth Circuit be reversed, and this case be reinstated and remanded for further proceedings.

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